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No. 2944

No. 14805

United States
Court of Appeals
for the Ninth Circuit.

AMERICAN PACIFIC DAIRY PRODUCTS, INC., a Corporation,

Appellant,

vs.

JOSEPH A. SICILIANO,

Appellee.

JOSEPH A. SICILIANO,

Appellant,

vs.

AMERICAN PACIFIC DAIRY PRODUCTS, INC., a Corporation,

Appellee.

Transcript of Record
In Two Volumes

Volume I
(Pages 1 to 258)

Appeals from the District Court for the District of Guam, Territory of Guam.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—11-4-55

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

LITTLE, LeSOURD, PALMER, SCOTT & SLEMMONS,
1510 Hoge Bldg.,
Seattle, Washington;

FINTON J. PHELAN, JR., ESQ.,
201 Mesa Bldg.,
Agana, Guam;

For the Appellant.

JOHN A. BOHN, ESQ.,
P. O. Box 771,
Agana, Guam;

WALTER S. FERENZ,
903 First St.,
Benicia, California;

For the Appellee.

In the District Court of Guam in and for the Territory of Guam

Civ. Cs. No. 59-54

JOSEPH A. SICILIANO,

Plaintiff,

vs.

AMERICAN PACIFIC DAIRY PRODUCTS, INC., a Corporation; EDWARD THOMPSON; NORMAN THOMPSON; FIRST DOE; SECOND DOE; and BLACK and WHITE CORPORATION,

Defendants.

COMPLAINT

The Plaintiff complains of the Defendants and for cause of action alleges:

First Cause of Action

For a first and separate cause of action alleges:

I.

That Plaintiff is ignorant of the true names of the Defendants sued herein as First Doe, Second Doe, and Black and White Corporation, a Corporation, and prays that when the correct names of said Defendants are ascertained, Plaintiff may have leave to amend this Complaint accordingly, together with appropriate charging allegations.

II.

That on or about the 23rd day of June, 1952, the Plaintiff and the Defendant American Pacific Dairy

Products, Inc., a corporation, organized and existing under the laws of the State of Washington, entered into an agreement for the joint operation of a business to be conducted in Guam under the fictitious firm name and style of "Dairy Queen of Guam," and that said agreement was entitled "Articles of Co-partnership," a copy of said agreement, marked Exhibit A, is hereunto annexed and by this reference made a part hereof.

III.

That subsequent and pursuant to the execution of the said agreement the Plaintiff and Defendant American Pacific Dairy Products, Inc., actively engaged jointly in the business contemplated by said agreement and each of the parties thereto was thereby benefited until the Defendant American Pacific Dairy Products, Inc., wrongfully and in contravention of said Agreement excluded the Plaintiff therefrom.

IV.

That on or about the 4th day of April, 1953, the Defendant American Pacific Dairy Products, Inc., took steps to and actually did exclude and oust the Plaintiff from possession of the assets and all of the books, papers, accounts and records of said Dairy Queen of Guam, and excluded the Plaintiff from any and all participation in the business and the profits therefrom, and at all times thereafter has so excluded and now so excludes the Plaintiff from any access to or benefit of the same; that said exclusion and ouster was done prior to the expira-

tion of the term agreed upon and provided in the said "Articles of Co-partnership," was not by the express will of all the parties, was not bona fide in accordance with any power conferred by the said "Co-partnership Agreement" between the parties, and was caused in contravention of the partnership agreement and rights of the partners.

Second Cause of Action

And for a second and separate cause of action Plaintiff alleges:

I.

Plaintiff repleads all of the allegations contained in Paragraphs I, II, III, and IV of his First Cause of Action, to which reference is hereby made and the same are hereby incorporated and referred to in this Second Cause of Action and made a part hereof as though the same were again fully set forth.

II.

That on or about the 4th day of April, 1953, the Defendants, severally and jointly, did conspire among themselves to exclude the Plaintiff from the business and assets of "Dairy Queen of Guam" to which the Plaintiff was entitled to possession equally with Defendant American Pacific Dairy Products, Inc., and that because of such conspiracy the Defendants entered into possession of the various assets of "Dairy Queen of Guam," such possession being exclusive of the Plaintiff, and did thereby convert said assets and property of "Dairy Queen

of Guam" to their own sole and exclusive use and benefit.

III.

That because of such exclusion of the Plaintiff, the Plaintiff has been unable to determine what specific property each of the said Defendants have entered into possession of, but that the Plaintiff has been informed and believes that among other such assets Defendant Black and White Corporation has wrongfully entered into possession of and exercised and is now exercising certain patent and franchise rights of the "Dairy Queen of Guam" pertaining to the use of certain machinery, processes and methods for the manufacture of the particular soft ice cream and other dairy products, which patent and franchise rights belong exclusively to the "Dairy Queen of Guam."

Wherefore, Plaintiff prays judgment and decree as follows:

1. That an accounting be taken of the business of "Dairy Queen of Guam," whereby all Defendants herein shall be required to account for all assets, including profits and good will, of said business;

2. That it be decreed that the Plaintiff be allowed to continue the business in the same name, and that the Defendants and each of them be ordered to convey and transfer to the Plaintiff all of the assets of said "Dairy Queen of Guam";

3. That the Plaintiff be ordered to pay to the Defendant American Pacific Dairy Products, Inc.,

the value of said Defendant's interest in the "Dairy Queen of Guam" at the time of dissolution, such value not to include the value of the good will of said business and such value to be less damages adjudged against Defendant American Pacific Dairy Products, Inc., for the wrongful breach of the Agreement made a part of this Complaint as may be determined by the accounting prayed for herein;

4. That the amount of all profits of the said "Dairy Queen of Guam" business since the wrongful dissolution thereof, as found by the accounting herein prayed for, be ordered paid to the Plaintiff;

5. That damages for the conspiracy to convert and the conversion of the business assets of the "Dairy Queen of Guam" be adjudged against all of the Defendants and each of them in such an amount as may be determined by this Court through the accounting herein prayed for;

6. That damages may be adjudged against all of the Defendants and each of them, with the exception of American Pacific Dairy Products, Inc., for the injury to the good will and for the loss of profits of "Dairy Queen of Guam" as may be found due pursuant to said accounting herein prayed for;

7. That a permanent injunction be issued against all of the Defendants herein to restrain them from further use of any of the patent or franchise rights of the "Dairy Queen of Guam" and from further injury to the good will of said business; and

8. That the Plaintiff may have such other and further relief as may be just and equitable, together with costs of this action.

/s/ JOHN A. BOHN,
Attorney for Plaintiff.

/s/ ROBERT E. DUFFY,
Resident Counsel.

EXHIBIT A

Articles of Co-partnership

These Articles of Co-partnership made and entered into this 23rd day of June, 1952, by and between American Pacific Dairy Products, Inc., a Corporation duly organized under the laws of the State of Washington, with principal offices in the City of Seattle in said State of Washington, hereinafter referred to as "First Partner," and Joseph Siciliano, a citizen of the United States, with Post Office Box No. 178, Agana, Guam, hereinafter referred to as "Second Partner";

Witnesseth:

In consideration of the premises and the mutual covenants and conditions herein contained, It Is Agreed by and between the parties hereto as follows:

1. The parties hereby agree to become partners

in the business of ice cream, dairy products and allied efforts.

2. Name. The business of the said partnership shall be conducted under the firm name and style of Dairy Queen of Guam.

3. Term. The said partnership shall commence on the day and date of the execution of these Articles and shall continue for a period of fifty (50) years, unless sooner dissolved.

4. Place of Business. The business of the said partnership shall be conducted at such place or places in the territory of Guam and any other geographical location as may be agreed upon by the parties.

5. Capital Contributions. Each of the parties hereby contributes to the capital of the partnership the following respective amounts:

First Partner $15,000.00
Second Partner $15,000.00

6. Withdrawal of Capital. It is agreed that in no event shall either of the parties withdraw from the firm any amounts which will reduce his capital account below the amount stated in the foregoing paragraph; Provided, However, that upon the joint consent of the parties hereto, subsequent capital contributions may be withdrawn.

7. Salary. During the period that Second Partner shall act as manager of the co-partnership, he shall receive a salary at the rate of Six Hundred

Dollars ($600.00) per month, as and for compensation for managing the business of the co-partnership so long as it shall have but one (1) wholesale and retail outlet; in the event the company opens a second wholesale and retail outlet, said compensation to Second Partner shall be increased to One Thousand Dollars ($1,000.00) per month effective the day and date that said second outlet is opened for business; Provided, However, that in the event the co-partnership opens any outlets over and above two (2) outlets, the compensation to be derived by Second Partner for managing said business shall be determined by agreement between the co-partners; and Further Provided that Second Partner shall supervise the erection and construction of any additional units and shall receive as compensation for services to be rendered in connection with said erection and construction, a sum of money equal to ten per cent (10%) of the cost of said outlet.

8. Duties of Partners. First Partner agrees to have its officers, agents and employees devote such time, as may be mutually agreed upon between the partners, to the best interests of the partnership, during the continuance thereof. Second Partner agrees to devote such time, as may be mutually agreed upon between co-partners, together with his skill and energy, to the best interests of the business of the co-partnership.

9. Profits and Losses. The profits arising out of the conduct of the business shall be divided between the parties in the same proportions as their

individual capital contributions bear to the total capital of the partnership and losses shall be borne in the same manner.

10. Accounts and Books. Full, just, true and accurate accounts shall be kept of all matters relating to the business to be conducted by the partnership, and the books containing such accounts shall at all times be open to the inspection of both parties hereto. Depreciation of all assets shall be computed based upon eighty per cent (80%) of the useful life of each asset as said useful life is reflected in U. S. Treasury Department, Federal Bureau of Internal Revenue Bulletin F.

11. Inventory. On such dates as the partners may mutually agree, during the continuance of the partnership, there shall be taken a full and complete inventory of the business and the parties shall render each to the other a just and true account of all matters and things relating to the said business at the time of taking of such inventory, whereupon the profits and losses, as the case may be, shall be ascertained and divided in accordance with Paragraph 9 of this Agreement.

12. Option of One Partner to Retire. In the event either party should desire to retire from the partnership, he shall give the other party written notice of his intention so to do and the remaining partner shall have an option for the ninety (90) days, next ensuing the receipt of such notice, to elect to buy out said retiring partner and acquire

sole ownership of the business of Dairy Queen of Guam in the following manner:

a. An inventory shall be taken on a day to be mutually agreed upon by the partners, and the interest of the retiring partner shall be determined from such inventory and in the manner customarily employed by the firm in preparing its financial statements, with the exception that good will shall be reflected as an amount equal to two and one-half (2½) times the net profits of the firm for the twelve (12) calendar months immediately preceding the said inventory date, after allowing six per cent (6%) interest on invested capital.

b. Within ten (10) days after the interest of the retiring partner shall have been determined in the manner set forth in the preceding paragraph, he shall be paid by the remaining partner for said interest as follows: one-third (⅓) in cash or by duly certified check; one-third (⅓) by the remaining partner giving his promissory note for one-third (⅓) of the amount of such interest, payable six (6) months from said date, and bearing interest at the rate of six per cent (6%) per annum; and the remaining one-third (⅓) by giving a further promissory note for one-third (⅓) of the amount of such interest, payable twelve (12) months from said date, and bearing interest at the rate of six per cent (6%) per annum.

13. In Event of Death. In the event of death of Second Partner during the continuance of the

partnership, the firm shall not be dissolved but shall continue by the admission of the heirs of Second Partner if they should so desire, as partners in the place and stead of said deceased partner.

If the heirs of said deceased partner should become partners under the provisions of this paragraph and should subsequently desire to withdraw from partnership, the surviving partner shall have the option to purchase the interest of said retiring heirs in accordance with the provisions of Paragraph 12 of these Articles, anything else in this agreement to the contrary notwithstanding.

The continuance of the firm following the death of the Second Partner shall be subject to the following additional terms and conditions:

a. The salary of the Second Partner shall cease at the time of his death.

b. The surviving partner shall have the sole and exclusive right to select the manager of the business and to fix the salary of said manager: Provided, However, that said salary shall not exceed the salary paid to Second Partner as of the time of his death.

c. If the heirs of the deceased partner should not desire to enter the firm as partners, they shall give to the surviving partner written notice of said decision, and the surviving partner, shall have an option for a period of ninety (90) days next ensuing the day and date of the receipt of said notice, to elect to purchase the interest of the deceased partner, and in the event the surviving partner should

so elect to purchase said interest, the manner of giving notice of said election, the value of said deceased partner's interest, and the manner of payment therefor, shall be the same as and governed by the provisions for the retirement of a partner as set forth in subparagraphs 12 a and b, with the exception that in computing the share of the deceased partner in the business, there shall be charged to the sole account of said deceased partner all costs incident to the termination of the partnership and the determination of the share of said deceased partner, specifically including all expenses incurred in the taking of an inventory of the assets of the partnership and auditing the partnership accounts, and any legal expenses incidental to the dissolution of the partnership.

In Witness Whereof, the parties hereto have set their hands in Agana, Guam, the day and date in this agreement first above written, American Pacific Dairy Products, Inc., by its representative thereunto duly authorized.

AMERICAN PACIFIC DAIRY PRODUCTS, INC.

By /s/ EDWARD THOMPSON,
President, First Partner.

/s/ JOSEPH SICILIANO,
Second Partner.

Territory of Guam,
City of Agana—ss.

On this 23rd day of June, 1952, before me a Notary Public in and for the territory of Guam, personally appeared Edward Thompson, known to me to be the President of American Pacific Dairy Products, Inc., a Washington corporation, and acknowledged to me that he executed the within instrument as its duly authorized representative.

/s/ PATRICIA E. TURNER,
Notary Public in and for the
Territory of Guam.

My commission expires Aug. 16, 1952.

Territory of Guam,
City of Agana—ss.

On this 23rd day of June, 1952, before me, a Notary Public in and for the territory of Guam, personally appeared Joseph Siciliano, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

/s/ PATRICIA E. TURNER,
Notary Public in and for the
Territory of Guam.

My commission expires Aug. 16, 1952.

Duly verified.

[Endorsed]: Filed September 20, 1954.

[Title of District Court and Cause.]

SPECIAL APPEARANCE AND MOTION TO DISMISS

The defendant, American Pacific Dairy Products, Inc., specially appears and, pursuant to Rule 12(b) of Federal Rules of Civil Procedure, moves the court as follows:

I.

To dismiss the above-entitled action because it appears on the face of the Complaint that the court lacks jurisdiction over the subject matter.

II.

To dismiss the action on the ground that defendant is a corporation, is not a citizen or resident of the unincorporated territory of Guam in which this action is brought, and is a resident and citizen of the State of Washington.

III.

To dismiss the action because the court is without jurisdiction, and all the named defendants to this action are citizens and residents of the State of Washington and the plaintiff is a citizen and resident of the State of Nevada.

IV.

To dismiss the action because the plaintiff is not entitled to relief herein prayed for in this jurisdiction in that no party to this suit is a resident or

citizen of the unincorporated territory of Guam wherein this action is brought.

V.

To dismiss the action on the ground that process is insufficient as required by Federal Rules of Civil Procedure, Rule 4.

VI.

To dismiss this action on the ground that under the provisions of Section 1391, Title 28, U.S.C.A., this action can only be brought in the Northern Division of the Western District of the Judicial District of Washington or in the Judicial District of Nevada.

VII.

This motion is based upon the pleadings and files in this case and upon the attached affidavits and exhibits.

/s/ FINTON J. PHELAN, JR.,
Attorney for Defendant, American Pacific Dairy, Products, Inc.

FINTON J. PHELAN, JR., for
LITTLE, LeSOURD, PALMER,
SCOTT & SLEMMONS,
Attorneys for Defendant, American Pacific Dairy Products, Inc., 1510 Hogue Building, Seattle 4, Washington.

[Title of District Court and Cause.]

AFFIDAVIT

Unincorporated Territory of Guam,
City of Agana—ss.

Finton J. Phelan, Jr., being duly sworn, on oath, deposes and says:

1. That he is an attorney-at-law with offices at Suite 201-203, Mesa Building, 1st Street West, City of Agana, unincorporated territory of Guam, and one of the attorneys for the defendants herein.

2. That he has been counsel of record in those certain suits, namely, Civil No. 78-52 and Civil No. 79-52, filed in the District Court of Guam on the 23rd day of October, 1952, in which action Joseph A. Siciliano was named a party defendant and also in that certain action filed in the Island Court of the unincorporated territory of Guam and being known as Civil No. 14-53 wherein Joseph A. Siciliano, the plaintiff herein, was named as a party defendant; and that he was associated with counsel for the defendant in that certain suit filed in the Eighth District Court in and for the County of Clark, State of Nevada, and being known as Civil No. 57911, filed the 21st day of August, 1952, in which suit, Joseph A. Siciliano, the plaintiff herein, was the plaintiff.

3. That that certain action filed in the Eighth District Court in and for the County of Clark, State of Nevada and being known as case No. 57911, was

commenced by a verified complaint wherein Joseph A. Siciliano swore that he was a citizen and resident of the State of Nevada, the said affidavit being verified before one Louis Wiener, Jr., notary public for Clark County, State of Nevada. That on the date of the making of this affidavit said suit is still on the calendar of the Eighth District Court in and for the County of Clark, State of Nevada, and has not been dismissed.

4. That pursuant to the settlement negotiations in connection with the various actions above referred to the said Joseph A. Siciliano executed in the State of Nevada, on the 19th day of August, 1953, a special power of attorney wherein he authorized said attorney in fact to settle the said cases. A copy of said special power of attorney is hereto attached.

5. That pursuant to the said power of attorney referred to in the last preceding paragraph, Lyle H. Turner, as attorney in fact for Joseph A. Siciliano, caused to be executed on the 3rd day of March, 1954, a certain agreement wherein Joseph A. Siciliano, plaintiff in this suit, stated that he was a resident of the City of Las Vegas, County of Clark, State of Nevada. Attached hereto are copies of pages 1, 14, and 15 of said agreement showing said residence in said City of Las Vegas, County of Clark, State of Nevada, together with the signatures and the acknowledgment taken before a Notary Public.

6. On information and belief said plaintiff herein, Joseph A. Siciliano, continues to be a citizen and resident of the City of Las Vegas, County of Clark, State of Nevada, and is within the unincorporated territory of Guam, solely as a temporary or transit visitor for business purposes and further that in making his application for Naval Security Clearance for the purpose of obtaining permission from the Chief of Naval Operations for this business trip to Guam, the said Joseph A. Siciliano said further that he was a citizen and resident of the State of Nevada.

7. Further on information and belief the American Pacific Dairy Products, Inc., is a corporation organized and domiciled in the State of Washington, and is a citizen of said State, maintaining its corporate offices and books in the City of Seattle, in the Northern Division of the Western District of the Judicial District of Washington. The corporate office address is 1113 18th Avenue North, Seattle 2, Washington.

8. That on information and belief Edward Thompson, one of the defendants herein, is a citizen and resident of the State of Washington and is not and has not been a resident of the unincorporated territory of Guam.

9. That on information and belief Norman Thompson, one of the defendants herein, is a citizen and resident of the State of Washington and is not and has not been a resident of the unincorporated territory of Guam.

Further your deponent sayeth not.

/s/ FINTON J. PHELAN, JR.,
Attorney of Record for Defendants, American Pacific Dairy Products, Inc., and Norman Thompson.

Duly verified.

Special Power of Attorney

To Whom It May Concern:

Be It Known that I, the undersigned, hereby authorize Lyle H. Turner, of the firm of Spiegel, Turner & Stevens, for me and in my stead to execute, with the same authority as though executed by myself, a property settlement agreement settling property rights of myself and Angelina Siciliano. The authority to Lyle H. Turner authorizes him to make any agreement for the payment of money, conveyance of property, division of property, agreement to obligations for future payment, or agreement to obligation for immediate payment of such sums of money as he may see fit to pay or authorize to be paid on my behalf to the said Angelina Siciliano.

This authorization shall be effective forthwith and shall be irrevocable for a period of six months from date hereof.

Dated, at Las Vegas, Nevada, this 19th day of August, 1953.

/s/ JOSEPH SICILIANO,
Also Known as Joe Siciliano.

State of Nevada,
County of Clark—ss.

On this 19th day of August, 1953, personally appeared before me, the undersigned, a Notary Public in and for said County and State, Joseph Siciliano, also known as Joe Siciliano, to me known and known to me to be the individual who executed the foregoing instrument and he duly acknowledged to me that the same was executed by him, freely and voluntarily and for the uses and purposes therein mentioned.

/s/ [Indistinguishable.]
Notary Public, Clark County, Nevada.

My commission expires Aug. 18, 1955.

Agreement

This Agreement, made this 3rd day of March, 1954, by and between Joseph Siciliano, also known as Joseph Anthony Siciliano, a resident of the City of Las Vegas, County of Clark, State of Nevada, and formerly of the district of Maite, municipality of Barrigada, territory of Guam, party of the first part, hereinafter referred to as "Husband," and Angelina Siciliano, a temporary resident of the district Maite, municipality of Barrigada, territory of Guam, party of the second part, hereinafter referred to as "Wife,"

Witnesseth:

Whereas, the parties intermarried at Morrisville, Commonwealth of Pennsylvania, on the 23rd day of December, 1931, and ever since have been and now are husband and wife; and

Whereas, irreconcilable differences have arisen between them which render it impossible to longer continue to live together as husband and wife; and

Whereas, no children have been born of the marriage and no children have been adopted by the parties hereto; and

Whereas, Wife, on the 22nd day of July, 1952, instituted in the Island Court of the territory of Guam, an action for

* * *

Husband shall be addressed to him at the law office of Spiegel, Turner and Stevens, P. O. Box 54, Agana, Guam, or to such other address as Husband may hereinafter designate in writing served upon Wife. Any service to be made as aforesaid upon Wife shall be so addressed to her at the law office of E. R. Crain, P. O. Box 406, Agana, Guam, or to such other address as Wife may hereafter designate in writing served upon Husband.

21. This agreement is declared binding upon the heirs, legal representatives and assigns of both parties hereto.

In Witness Whereof, the parties hereto have caused these presents to be executed in Agana, Guam, the day and date in this agreement first

above written, Husband by his duly authorized attorney in fact.

/s/ ANGELINA SICILIANO,
Party of the First Part.

/s/ JOSEPH ANTHONY
SICILIANO.

By /s/ LYLE H. TURNER,
His Duly Authorized Attorney in Fact, Party of the Second Part.

Territory of Guam—ss.

On this 4th day of March, 1954, before me, a Notary Public in and for the territory of Guam, personally appeared Angelina Siciliano, known to me to be the person whose name is subscribed to the within instrument, and acknowledged that she executed the same.

/s/ ENRIQUE R. MESA,
Notary Public in and for the
Territory of Guam.
My commission expires November 23, 1954.

Territory of Guam—ss.

On this 3rd day of March, 1954, before me, a Notary Public in and for the Territory of Guam, personally appeared Lyle H. Turner, known to me to be the person whose name is subscribed to the

within instrument as the attorney in fact of Joseph Anthony Siciliano, and acknowledged to me that he subscribed the name of Joseph Anthony Siciliano thereto as principal, and his own name as attorney in fact.

/s/ MARTHA MACKEY,
Notary Public in and for the
Territory of Guam.

My commission expires May 6, 1955.

[Endorsed]: Filed October 13, 1954.

[Title of District Court and Cause.]

AMENDED COMPLAINT

The Plaintiff complains of the Defendant and for cause of action alleges:

I.

That the court has jurisdiction under section 62 of the Code of Civil Procedure of Guam and that the amount of the assets of the partnership which is the subject of this action, exceeds the sum of Two Thousand Dollars ($2,000.00).

II.

That on or about the 23rd day of June, 1952, the Plaintiff and the Defendant American Pacific Dairy Products, Inc., a corporation, organized and existing under the laws of the State of Washington and doing business in the Territory of Guam, entered into an agreement for the joint operation of a busi-

ness to be conducted in Guam under the fictitious firm name and style of "Dairy Queen of Guam"; that said agreement was entitled "Articles of Co-partnership" and a copy thereof, marked Exhibit A, is hereunto annexed and by reference made a part hereof.

III.

That subsequent and pursuant to the execution of the said agreement the Plaintiff and Defendant actively engaged jointly in the business contemplated by said agreement and each of the parties thereto was thereby benefited until the Defendant wrongfully and in contravention of said agreement sought to cancel said agreement and exclude the Plaintiff from the operation of said business as hereinafter set forth.

IV.

That on or about the 4th day of April, 1953, the Defendant American Pacific Dairy Products, Inc., took steps to and actually did exclude and oust the Plaintiff from possession of the assets and all of the books, papers, accounts and records of said Dairy Queen of Guam, and excluded the Plaintiff from any and all participation in the business and the profits therefrom, and at all times thereafter has so excluded and now so excludes the Plaintiff from any access to or benefit of the same; that said exclusion and ouster was done prior to the expiration of the term agreed upon and provided in the said "Articles of Co-partnership," was not by express will of all the parties, was not bona fide in accordance with any power conferred by the said "Co-partnership

Agreement" between the parties, and was caused in contravention of the partnership agreement and rights of the partners.

V.

That the Defendant wrongfully and in contravention of the partnership agreement has declared the same terminated as of May 12, 1953; has notified Plaintiff that its Board of Directors refuses to ratify the partnership agreement and other contracts involving the business, and has taken exclusive possession of all of the assets, books, papers, accounts and records of said Dairy Queen of Guam.

VI.

That the Defendant has wrongfully and in contravention of the partnership agreement denied that the Plaintiff has an interest in the profits of the business or a partnership interest in the assets and control thereof, and has wholly failed to render an accounting to the Plaintiff of the condition of the affairs of the business.

VII.

That the Defendant owns or controls certain patent and franchise rights pertaining to the use of machinery, processes and methods for the manufacture and sale of a particular soft ice cream and other dairy products, which patent and franchise rights were given exclusively to the partnership for use in Guam; that Plaintiff is informed and believes and on that ground alleges that the Defendant has

wrongfully and in contravention of the partnership agreement permitted a competing business known as Guam Frozen Products, Inc., to become established in Guam which has been given the advantage of and is utilizing said patent and franchise rights.

VIII.

That the managing resident agent of the Defendant Corporation has been appointed manager of the business of the partnership and has been given unlimited access to and control of the books, records, papers and trade secrets of the partnership business; that the said manager has also become a stockholder and director of the competing business referred to in paragraph VII hereof; that the president of the Defendant corporation has unlimited access to and control of the books, records, papers and trade secrets of the partnership business and also has become a stockholder of the competing business referred to in paragraph VII hereof.

Wherefore, Plaintiff prays judgment and decree as follows:

1. That pending the trial of this action a Receiver be appointed by the court to take possession and control of the partnership business, to audit the accounts thereof, and to report to the court the result thereof and the condition of the affairs of the business.

2. That an accounting be taken of the business of "Dairy Queen of Guam," whereby the Defend-

ant shall be required to account for all assets, including profits and good will, of said business.

3. That it be decreed that the Plaintiff be allowed to continue the business in the same name, and that the Defendant be ordered to convey and transfer to the Plaintiff all of the assets of said "Dairy Queen of Guam."

4. That the Plaintiff be ordered to indemnify the Defendant by bond approved by the court against all present or future partnership liabilities and to secure the payment to the Defendant by bond approved by the Court, the value of said Defendant's interest in the "Dairy Queen of Guam" at the time of dissolution, such value not to include the value of the good will of said business, and such value to be less damages adjudged against Defendant for the wrongful breach of the partnership agreement.

5. That the Plaintiff may have such other and further relief as may be just and equitable, together with costs of this action.

/s/ JOHN A. BOHN,
Attorney for Plaintiff.

/s/ ROBERT E. DUFFY,
Resident Counsel.

EXHIBIT A

[Exhibit A attached is identical to Exhibit A attached to the original Complaint.]

Duly verified.

Receipt of copy acknowledged.

[Endorsed]: Filed October 26, 1954.

[Title of District Court and Cause.]

SPECIAL APPEARANCE AND MOTION TO DISMISS

The defendant, American Pacific Dairy Products, Inc., specially appears and, pursuant to Rule 12(b) of Federal Rules of Civil Procedure, moves the court as follows:

I.

To dismiss the amended complaint in the above-entitled action because it appears on the face of the complaint that the court lacks jurisdiction and that the requisite jurisdictional averments are not contained within the complaint.

II.

To dismiss the amended complaint on the ground that defendant is a corporation, is not a citizen or resident of the unincorporated territory of Guam in which this action is brought and is a citizen and

resident of the State of Washington. That the alleged claim of the plaintiff herein as set forth in the amended complaint arose within the State of Washington.

III.

To dismiss the amended complaint herein because the court is without jurisdiction and the defendant in this action is a citizen and resident of the State of Washington, and the plaintiff herein is a citizen and resident of the State of Nevada, and this cause of action arose in the district of defendant's residence.

IV.

To dismiss the amended complaint because the plaintiff is not entitled to the relief herein prayed for in this jurisdiction in that no party to this action is a resident or citizen of the unincorporated territory of Guam, wherein this action is brought and that the claim alleged arose outside this jurisdiction.

V.

To dismiss the amended complaint herein filed in that it fails to state a claim upon which relief can be granted.

VI.

To dismiss the amended complaint filed herein on the ground that process and service is insufficient as required by Federal Rules of Civil Procedure, Rule 4.

VII.

This motion is based upon the pleadings and files

in this case and upon the affidavits and exhibits heretofore filed.

/s/ FINTON J. PHELAN, JR.,
Attorney for Defendant, American Pacific Dairy Products, Inc.

/s/ FINTON J. PHELAN, JR., for

LITTLE, LeSOURD, PALMER, SCOTT & SLEMMONS,
Attorneys for Defendant, American Pacific Dairy Products, Inc., 1510 Hoge Building, Seattle 4, Washington.

[Endorsed]: Filed November 5, 1954.

[Title of District Court and Cause.]

MOTION FOR CHANGE OF VENUE ON THE GROUND OF CONVENIENCE OF PARTIES AND WITNESSES IN THE INTEREST OF JUSTICE

In the alternative, and only in the event that defendant's motion to dismiss the amended complaint is denied, then the defendant moves the court as follows:

I.

To issue an order transferring the above-entitled cause to the United States District Court in and for the Northern Division of the Western District of the State of Washington at Seattle, Washington, on

the ground that such transfer is for the convenience of the parties and witnesses as more clearly appears in the affidavits of Norman Thompson and Finton J. Phelan, Jr., hereto annexed as exhibits A and B.

Dated this 5th day of November, 1954, at Agana, Guam.

/s/ FINTON J. PHELAN, JR.,
Attorney for Defendant, American Pacific Dairy Products, Inc.

/s/ FINTON J. PHELAN, JR., for
LITTLE, LeSOURD, PALMER, SCOTT & SLEMMONS,
Attorneys for Defendant, American Pacific Dairy Products, Inc.

[Title of District Court and Cause.]

AFFIDAVIT

Unincorporated Territory of Guam,
City of Agana—ss.

Norman Thompson, being first duly sworn, on oath, deposes and says:

1. That he is familiar with the defendant herein, American Pacific Dairy Products, Inc., and that of his own knowledge the said defendant corporation maintains its principle offices in the City of Seattle, State of Washington, at 1113-18th Avenue North.

2. That at said main offices all the books of account and corporate records are permanently maintained.

3. That all of the employees and agents of said defendant corporation having access and connection with the books, records and files of the defendant corporation reside in and work in the said City of Seattle, State of Washington. That the officers of the said corporation maintain their place of residence and business in the said City of Seattle, State of Washington.

4. That the directors of the said defendant corporation reside in and at the vicinity of said City of Seattle, State of Washington. That all meetings of the Board of Directors and all records of such meetings are held and maintained in the said principle offices of the said defendant corporation in the City of Seattle, State of Washington.

5. That all books of account and other business records of the said corporation are concentrated and maintained at the principle offices of the said corporation, which corporation operates under a centralized accounting and control system.

6. That of his own personal knowledge the vast majority of the witnesses and the records and other evidence which would be introduced in the defense of this action are situated in the said City of Seattle, State of Washington. That the cost of bringing witnesses to the unincorporated territory of Guam for the defense of this action would entail expenses of many thousands of dollars, would disrupt the

operation of the business of the corporation and put a great burden on the corporation and cause heavy financial loss. That bringing the necessary records, files and documents to Guam would be oppressively expensive and cause defendant corporation great financial loss. That many witnesses would have to be brought to the unincorporated territory of Guam in the defense of this action and that adequate quarters and facilities for these witnesses are not available within the unincorporated territory of Guam.

7. That the cost of taking depositions of these numerous witnesses would be burdensome and needlessly expensive, and that to transfer this cause to the United States District Court in and for the Northern Division of the Western District of the City of Seattle, State of Washington, for trial and disposition is in the interest of justice for the convenience of the parties and witnesses and will expedite the disposition of this matter, and in this connection affiant further says that the within action might have been brought in the latter form in the first instance for greater convenience of all the parties and witnesses.

Further your deponent sayeth not.

[Seal]: /s/ NORMAN THOMPSON.

Duly verified.

[Title of District Court and Cause.]

AFFIDAVIT

Unincorporated Territory of Guam,
City of Agana—ss.

Finton J. Phelan, Jr., being first duly sworn, on oath, deposes and says:

1. Affiant is the attorney within the unincorporated territory of Guam for the defendant in the above-entitled action.

2. That he has been informed by officers of the defendant and their counsel that the main office of the defendant is situated within the City of Seattle, State of Washington, at 1113-18th Avenue North.

3. That at said principle office of the defendant corporation all of their corporate records, papers and files are maintained and that likewise all the records and files of the Board of Directors of said corporation are maintained at the principle offices.

4. That the defendant corporation maintains a centralized system of control and all of its business records and management files are maintained at the principle offices of the defendant corporation in the City of Seattle, State of Washington.

5. That all the principle officers, directors and executive employees of the defendant corporation reside in and around the City of Seattle, State of Washington.

6. That the officers, directors and executive employees of said defendant corporation are and will be necessary and important witnesses in the defense of this action.

7. That the defendant corporation will suffer great damage if put to the expense of transporting the officers, directors and other key employees of said corporation to Guam for the trial and defense of this action and that the corporation will be greatly and needlessly injured by the necessary and forced absence of its key officers at such a great distance from the principle office in the City of Seattle, State of Washington.

8. That within the unincorporated territory of Guam are not adequate facilities for the temporary housing of these officers and other witnesses.

9. That the defendant corporation will be heavily damaged and put to great expense by having large amounts of its corporate and business records absent from its principle offices and that this absence will cause great loss in the operation of the business of the defendant corporation.

10. That due to the large number of depositions of officers, directors, employees and accountants which would have to be taken, defendant corporation would be put to great and needless expense, inconvenience and will be hampered in the operation of its business.

11. That the forum of the Northern Division of the Western District at the City of Seattle, State

of Washington, is the most convenient one for the necessary and proper witnesses to attend and that a trial at that forum would incur the least cost and great saving of time for all concerned, and that for the convenience of the parties and witnesses and in the interest of justice to so transfer the case to the United States District Court in and for the Northern Division of the Western District at the City of Seattle, State of Washington, for trial and disposition in which district the within action might have been brought in the first instance is to the convenience of the parties and witnesses and is in the interest of justice in this cause.

Further your deponent sayeth not.

/s/ FINTON J. PHELAN, JR.,
Attorney for Defendant
Corporation.

Duly verified.

[Endorsed]: Filed November 5, 1954.

[Title of District Court and Cause.]

MOTION FOR MORE DEFINITE STATEMENT AND MOTION TO STRIKE

Motion for More Definite Statement

In the alternative, and only in the event that defendant American Pacific Dairy Products, Inc.'s motion to dismiss the amended complaint is denied and the motion for change of venue should there-

after be denied, defendant, American Pacific Dairy Products, Inc., moves the court as follows:

I.

That the amended complaint is so vague and ambiguous that defendant should not reasonably be required to prepare a responsive pleading and defendant American Pacific Dairy Products, Inc., therefore moves that plaintiff be ordered to furnish a more definite statement of the nature of his claim, as set forth, in the following repects:

1. In paragraph III of the amended complaint, plaintiff should be required to indicate when and where the parties hereto "actively engaged jointly in the business contemplated" and further in what manner and by what means defendant "sought to cancel said agreement and exclude the plaintiff from the operation of said business."

2. That in paragraph IV the plaintiff should be required to indicate the steps and actions which defendant "took to and actually did exclude and oust the plaintiff from possession of the assets and all the books, papers, accounts and records of said Dairy Queen of Guam" and to further set forth wherein the alleged exclusion violated the articles of co-partnership and the rights of the partners.

3. That in paragraph V the plaintiff should be required to set forth more fully when, how and where the Board of Directors of the defendant corporation has taken exclusive possession of all the assets, books, papers and accounts of the Dairy Queen of Guam.

4. That in paragraph VI the plaintiff should be required to set forth when and where the defendant denied the plaintiff has an interest in the profits of the business or a partnership interest and when and where the plaintiff demanded or sought an accounting.

5. That in paragraph VII the plaintiff should be required to set forth what patent and franchise rights were given exclusively to the partnership for use in Guam and in what manner the partnership agreement forbids a competing business to become established in Guam.

6. That in paragraph VIII the plaintiff should be required to set forth the extent and nature of the trade secrets of the partnership business and in what manner the fact that an employee or officer of the defendant injures plaintiff by having access to the records of the partnership business.

/s/ FINTON J. PHELAN, JR.,
Attorney for Defendant, American Pacific Dairy Products, Inc.

/s/ FINTON J. PHELAN, JR., for
LITTLE, LeSOURD, PALMER, SCOTT & SLEMMONS,
Attorneys for Defendant, American Pacific Dairy Products, Inc.

Motion to Strike

In the alternative, and only in the event that defendant's motion to dismiss the amended complaint is denied, and thereafter the motion for change of

venue and motion for more definite statement be denied, then defendant American Pacific Dairy Products, Inc., moves the court to strike paragraph III of the amended complaint on the ground that it is a conclusion of law and not an allegation of fact.

To strike paragraph V of the amended complaint on the ground that it is a conclusion of law and not an allegation of fact.

To strike paragraph VI of the amended complaint on the ground that it is a conclusion of law and not an allegation of fact.

To strike paragraph VII of the ammended complaint on the ground that it is a conclusion of law and not an allegation of fact.

To strike paragraph VIII of the amended complaint on the ground that it is a conclusion of law and not an allegation of fact, and the further ground that said paragraph VIII is irrelevant and immaterial.

/s/ FINTON J. PHELAN, JR.,
Attorney for Defendant, American Pacific Dairy Products, Inc.

/s/ FINTON J. PHELAN, JR., for
LITTLE, LeSOURD, PALMER,
SCOTT & SLEMMONS,
Attorneys for Defendant, American Pacific Dairy Products, Inc.

[Endorsed]: Filed November 5, 1954.

[Title of District Court and Cause.]

ANSWER AND CROSS-COMPLAINT

The defendant, American Pacific Dairy Products, Inc., for answer to the complaint herein, admits, denies, and alleges as follows:

I.

The defendant denies the allegations contained in paragraph I of the complaint.

II.

The defendant admits that part of paragraph II of the complaint which alleges that the defendant is a corporation organized and existing under the laws of the State of Washington, but denies each and every other allegation on paragraph II.

III.

The defendant denies the allegations contained in paragraph III of the complaint.

IV.

The defendant admits that American Pacific Dairy Products, Inc., took possession of the assets and all of the books, papers, accounts and records of the Dairy Queen of Guam, and has operated the business exclusively for American Pacific Dairy Products, Inc., but denies each and every other allegation contained in paragraph IV.

V.

The defendant admits it has taken exclusive possession of the assets of said Dairy Queen of Guam

and that it has informed the plaintiff that its Board of Directors has refused to ratify any partnership agreements with the plaintiff, but denies each and every other allegation of paragraph V of the complaint.

VI.

The defendant denies the allegations contained in paragraph VI of the complaint.

VII.

The defendant admits that part of paragraph VII of the complaint which alleges that the defendant owns or controls certain franchise rights pertaining to the use of machinery, processes and methods for the manufacture and sale of a particular soft ice cream and other dairy products, but the defendant denies each and every other allegation of paragraph VII of the complaint.

VIII.

The defendant denies that there is a partnership business and therefore denies each and every allegation of paragraph VIII of the complaint.

Wherefore, having fully answered, the defendant prays that plaintiff's Amended Complaint be dismissed with prejudice and with costs taxed in favor of this defendant and against the plaintiff.

First Defense

The complaint fails to state a claim against defendant upon which relief can be granted.

Second Defense

The court in this action lacks jurisdiction of the subject matter.

Third Defense

The venue of this action is improper.

Counterclaim

The defendant for cross-complaint against the plaintiff alleges as follows:

I.

On June 23, 1952, Edward Thompson, President of the defendant corporation, entered into certain agreements with the plaintiff purporting to create a partnership between the plaintiff and defendant to be known as "Dairy Queen of Guam." The purported agreements were as follows:

1. Articles of Co-Partnership, a true and correct copy of which is hereto attached and included herein as Exhibit A.

2. Agreement as to the sale of assets by defendant to plaintiff, a true and correct copy of which is attached hereto and included herein as Exhibit B.

3. Assignment of lease by defendant, a true and correct copy of which is attached hereto and included herein as Exhibit C.

4. Certificate of Co-Partnership transacting business under a fictitious name, a true copy of which is attached hereto and included herein as Ex-

hibit D. All of the purported agreements referred to above were subject to ratification by the Board of Directors of the defendant corporation and that fact was known to plaintiff at the time of the execution of the agreements.

II.

At the time the agreements referred to above were negotiated, the defendant had previously leased property upon which to construct a retail store, had acquired necessary licenses, and had actually started operations. The defendant in the development of said business had expended approximately Forty-four Thousand Dollars ($44,000.00). The defendant did not have a manager for the business and the President of the defendant went to Guam for the purpose of making arrangements for the management of the business, and to develop further business sites. Defendant's President negotiated with plaintiff and plaintiff agreed to manage the business and develop new business sites on the condition he receive one-half of the business. Defendant's President agreed to this arrangement on the basis of plaintiff's representation that plaintiff was in a position to manage and supervise the business and develop future business sites. Plaintiff refused to accept evaluation of the assets of Forty-four Thousand Dollars ($44,000.00) and did agree to a valuation of only Thirty-eight Thousand Twenty-six Dollars ($38,026.00). Relying upon the representations of the plaintiff such as his statement that he would personally manage the business and develop new

business sites, the defendant's President made agreements with the plaintiff, subject to ratification of defendant's Board of Directors.

III.

Immediately after execution of the proposed agreements, plaintiff left Guam and devoted none of his personal knowledge, skill or energy to the business or the acquisition of further business, and thereby caused the defendant the loss of profits and future business sites.

IV.

The business was operated in a haphazard manner without proper management. The reports concerning operations were grossly inadequate and the records were negligently and inadequately maintained, the store was being operated on irregular hours, the supervision and management was inadequate, there existed an overstock of supplies, a second store was not started due to the plaintiff's absence, and other new stores were causing competition because of lack of plaintiff's management; and as a consequence sales were far less than they would have been under proper management. The plaintiff did not return to Guam during this period.

V.

On October 6, 1952, the Board of Directors of the defendant was informed of the complete default of the plaintiff immediately after the execution of said agreements and of the uncertainty regarding plaintiff's ability to carry out the agreements and of his

utter disregard of the business, and therefore the Board of Directors of the defendant refused to ratify said agreements unless certain conditions were satisfied, which conditions were set forth in a resolution passed by the Board of Directors of the defendant, a true and correct copy of which is attached hereto as Exhibit E and by this reference made a part hereof. A copy of said resolution was sent to and received by the plaintiff and the plaintiff failed to comply with any of the conditions set forth in the resolution.

VI.

Defendant waited for more than sixty (60) days following passage of said resolution in order to give plaintiff an adequate opportunity to comply with conditions set forth therein, but after receiving no response the President of the defendant wrote to the plaintiff on March 4, 1953, and notified the plaintiff that the Board of Directors would not ratify said agreements unless the conditions were met, and asked for a response before March 15, 1953. The plaintiff received this letter but did not reply thereto.

VII.

In December, 1952, the defendant's President was required to make a special trip to Guam, at considerable expense to the defendant, in order to examine and conduct the affairs of the business and put it on a sound basis. Defendant's President found the business in very poor operating condition due to the lack of adequate management and supervision and de-

fendant's President was required to spend several weeks rehabilitating the business. The necessity for this was caused solely by the failure of the plaintiff to devote any time whatsoever to the conduct of the business.

VIII.

The defendant sent to plaintiff a notice of termination of the purported or de facto partnership effective May 12, 1953, stating that the Board of Directors of the defendant refused to ratify said agreements and thereupon made demand on the plaintiff for an accounting of all funds received by him in connection with the operation of "Dairy Queen of Guam" from June 23, 1952, to date. The defendant therein offered return of the plaintiff's capital contribution of Fifteen Thousand Dollars ($15,000.00) in an accounting.

IX.

The defendant suffered irreparable harm and injury to its business on account of the failure of the plaintiff under the de facto partnership heretofore operating to perform any services whatsoever or to devote any of his knowledge, skill or energy to the business. If properly managed and directed, the business from the existing store would have made One Hundred Four Thousand Five Hundred Six and 65/100 Dollars ($104,506.65) during the period from June 23, 1952, to April 30, 1953. Because of lack of adequate and proper management and unnecessary expenses, the business made only Eighty-

one Thousand Three Hundred Sixty-one and 03/100 Dollars ($81,361.03) during this period. Because of the plaintiff not being available at the existing store and not opening two new stores as projected in the meetings of June, 1952, the defendant suffered a total loss of Forty-five Thousand Seven Hundred Seventy-one and 94/100 Dollars ($45,771.94). The responsibility of the management and supervision of the business during this period was that of the plaintiff and he failed completely to discharge that responsibility. Defendant not only performed everything agreed to by it but also Defendant's President personally went to Guam to straighten out the business and preserve the investment. As plaintiff has performed no services whatsoever to the de facto partnership, the defendant alleges that plaintiff should not be entitled to any of the net profits therefrom and should account fully for all funds received by him from June 23, 1952, to May 12, 1953.

X.

Because of failure of plaintiff to manage said business and the consequent lack of supervision, the defendant, to preserve the business, was forced to appoint a resident manager therefor for the purpose of stopping any further loss and said business is now being operated on a sound basis.

Wherefore, defendant prays for judgment against the plaintiff as follows:

1. For an order confirming the termination of the de facto partnership heretofore existing between

plaintiff and defendant with regard to "Dairy Queen of Guam" as of May 12, 1953.

2. For an order affirming the defendant's right, title, and interest as the sole owner of the "Dairy Queen of Guam."

3. That the plaintiff account for all monies received during the de facto partnership in the operation of "Dairy Queen of Guam."

4. That the Court decree that the plaintiff receive the original Fifteen Thousand Dollars ($15,000.00) investment which he made in the business, less any amounts to which the defendant may be entitled under the accounting prayed for in paragraph 3, and less damages in the sum of Forty-five Thousand Seven Hundred Seventy-one and 94/100 Dollars ($45,771.94) which the defendant has suffered because of plaintiff, including in addition the costs, disbursements, and attorney fees in this action; and further that the defendant receive all the remaining profits and capital interests of "Dairy Queen of Guam."

5. Such other and further relief as the Court may deem proper and lawful.

/s/ FINTON J. PHELAN, JR.,
Attorney for Defendant.

EXHIBIT A

[Exhibit A attached is identical to Exhibit A attached to the Original Complaint.]

EXHIBIT B

Agreement

This Agreement, made and entered into this 23rd day of June, 1952, by and between American Pacific Dairy Products, Inc., a corporation duly organized under the laws of the State of Washington, hereinafter referred to as American Pacific, Party of the First Part, and American Pacific Dairy Products, Inc., and Joseph Siciliano, co-partners, doing business in the territory of Guam under the fictitious firm name and style of Dairy Queen of Guam, hereinafter referred to as Dairy Queen, Parties of the Second Part,

Witnesseth:

Whereas, the Party of the First Part has prior hereto expended Thirty-eight Thousand Twenty-six Dollars and No Cents ($38,026.00), in connection with activating a Dairy Queen store in the territory of Guam; and

Whereas, the Parties of the Second Part have this date formed a co-partnership for the purpose of operating said Dairy Queen store and engaging in such other activities as the Parties may subsequently mutually agree, and

Whereas, the Parties hereto desire to clarify the investment in said co-partnership and enter into an agreement regarding other matters as hereinafter provided;

Now, Therefore, in consideration of the premises and mutual covenants and conditions herein contained, it is agreed by and between the Parties hereto as follows:

1. American Pacific hereby sells, transfers and assigns unto the Parties of the Second Part all of the assets of the Dairy Queen store which it has constructed on Guam, including the building, stock in trade, furniture, fixtures, and supplies. There is attached hereto, marked Exhibit "A," a complete itemized list of said assets. The Parties of the Second Part acknowledge that by separate written instrument American Pacific has assigned to Dairy Queen the lease of Lots Nos. 1413, 1413-1 and 1414, Agana, Guam. American Pacific acknowledged that it has received a one-half (½) interest in said co-partnership and that that interest together with the other provisions of this agreement constitute good consideration for the aforesaid transfer of assets.

2. It is agreed that there is due to American Pacific from Dairy Queen the sum of Eight Thousand Twenty-six Dollars ($8,026.00) which is to be paid out of the net profits of Dairy Queen, if any there should be. American Pacific acknowledges that there is due from it to the Overseas Construction Company, a Guam co-partnership, the sum of Six Thousand One Hundred Fifty Dollars Fifty-seven Cents ($6,150.57) and that if Dairy Queen should pay said sum to said Overseas Construction Company, any

amounts so paid shall be debited by Dairy Queen against the said sum due American Pacific, with proof of said payments to be furnished to American Pacific.

3. American Pacific covenants and agrees that if it or Edward Thompson, presently the President of American Pacific, should enter into business in Okinawa of distributing products such as will be distributed in the territory of Guam by Dairy Queen, said Joseph Siciliano shall have the right to acquire a twenty-five per cent (25%) interest in said Okinawa business, on the same basis as American Pacific.

In Witness Whereof, the Parties hereto have set their hands on Guam, the day and date first above written, American Pacific by its representative thereunto duly authorized.

AMERICAN PACIFIC DAIRY
PRODUCTS, INC.,

By /s/ EDWARD THOMPSON,
President, Party of the First
Part.

In Witness Whereof:

/s/ PATRICIA E. TURNER.

AMERICAN PACIFIC DAIRY
PRODUCTS, INC.,

By /s/ EDWARD THOMPSON,
President.

In Witness Whereof:

/s/ PATRICIA E. TURNER.

By /s/ JOSEPH SICILIANO,
Parties of the Second Part.

In Witness Whereof:

/s/ PATRICIA E. TURNER.

I agree to individually be bound by the foregoing agreement.

Dated: June 23rd, 1952.

/s/ EDWARD THOMPSON.

EXHIBIT C

(Copy)

Lyle H. Turner,
Attorney-at-Law,
102-3 Aflague Building,
Agana, Guam.

Assignment of Lease of Real Property

Whereas, by written agreement executed on or about the 11th day of October, 1951, American Pacific Dairy Products, Inc., a corporation organized

and existing under and by virtue of the laws of the State of Washington, United States of America, as lessee, leased Lots Nos. 1413, 1413-1 and 1414, Anigua, Guam, M. I., for a term of five (5) years, with an option to renew said lease for an additional term of five (5) years, at a total monthly rental of One Hundred Dollars ($100.00) per month, and upon the other terms, covenants, conditions, and agreements set forth in said written lease; and

Whereas, the parties hereto desire to effect an assignment of said lease:

Witnesseth:

Now therefore, in consideration of the premises the said American Pacific Dairy Products, Inc., hereby assigns to American Pacific Dairy Products, Inc., and Joseph Siciliano, general co-partners doing business under the fictitious name, firm and style of Dairy Queen of Guam, said partners being hereinafter referred to as Dairy Queen of Guam, the said written lease and the benefits thereof, subject to the payment of the rent and the performance of the covenants, conditions, and stipulations therein contained.

The said American Pacific Dairy Products, Inc., hereby covenants with the said Dairy Queen of Guam that it has not done or suffered any act to be done whereby it is prevented from assigning the said lease agreement, and that it has an absolute right to assign said lease.

The said Dairy Queen of Guam hereby covenants with the said American Pacific Dairy Products, Inc., to perform and observe all of the covenants, conditions, and stipulations in the said lease on its part to be observed.

In Witness Whereof, the parties hereto have caused these presents to be executed in Agana, Guam, this 23rd day of June, 1952, American Pacific Dairy Products, Inc., by its representative thereunto duly authorized.

AMERICAN PACIFIC DAIRY PRODUCTS, INC.,

By /s/ EDWARD THOMPSON,
President,
Assignor.

DAIRY QUEEN OF GUAM,

By /s/ JOSEPH SICILIANO,
General Co-partner.

AMERICAN PACIFIC DAIRY PRODUCTS, INC.,

By /s/ EDWARD THOMPSON,
President, General
Co-partner, Assignee.

Territory of Guam,
United States of America—ss.

On this 28th day of June, 1952, before me a Notary Public in and for the territory of Guam, personally appeared before me Edward Thompson,

proved to me to be the President of American Pacific Dairy Products, Inc., a Washington corporation, and acknowledged to me that he executed the foregoing on behalf of said corporation.

....., Notary Public in and for the Territory of Guam.

My commission expires: August 16, 1952.

Territory of Guam,
United States of America—ss.

On this 23rd day of June, 1952, before me a Notary Public in and for the Territory of Guam, personally appeared before me Joseph Siciliano, known to me to be a General Co-partner of that certain business known as Dairy Queen of Guam, and acknowledged to me that he executed the same on behalf of said co-partnership.

/s/ PATRICIA E. TURNER,
Notary Public in and for the Territory of Guam.

My commission expires: August 16, 1952.

EXHIBIT D

(Copy)

Certificate of Co-partnership
Transacting Business Under Fictitious Name

Territory of Guam,
City of Agana—ss.

We, the undersigned, certify that we are partners transacting a wholesale and retail ice cream, snack bar and dairy products business on Lots Nos. 1413, 1413-1, and 1414, Agana, Guam, under the fictitious name:

Dairy Queen of Guam

The names of all the members of said co-partnership and their respective addresses are as follows, to wit:

Joseph Siciliano, Maite, Barrigada, Guam.

American Pacific Dairy Products, Inc., Seattle, Washington.

Witness our hands this 25th day of June, 1952.

/s/ JOSEPH SICILIANO,
AMERICAN PACIFIC DAIRY
PRODUCTS, INC.,

By /s/ EDWARD THOMPSON,
President.

On this 25th day of June, 1952, before me personally appeared Joseph Siciliano and Edward Thompson, the latter proved to me to be the Presi-

dent of American Pacific Dairy Products, Inc., a Washington Corporation, and acknowledged to me that they executed the foregoing instrument, said Edward Thompson executing it on behalf of said corporation.

/s/ PATRICIA E. TURNER,
Notary Public in and for the
Territory of Guam.

My commission expires: August 16, 1952.

EXHIBIT E

(Copy)

Excerpts From Minutes of Special Meeting of Board of Directors

April 4, 1953

Mr. Thompson made a general report concerning operations, but stated that he had not received any figures from Guam since December. He also stated that while he had again written to Joe Siciliano, as authorized at the last meeting of the board, he had not received any word from him, and that it had now been fairly definitely established that Siciliano was not going to return to Guam.

A general discussion followed, in which it was agreed that the company should now refuse to ratify the partnership agreement, should terminate the de facto partnership between Siciliano and American

Exhibit E—(Continued)

Pacific Dairy Products, Inc., under which, during the last eight months, the Dairy Queen store had been operated, tender Siciliano $15,000.00, being the amount of his original capital contribution, to be made available to Siciliano, however, only in the event he signs a complete release, and forthwith appoint Norman Thompson as Resident Manager of the store and of American Pacific Dairy Products, Inc. On motion duly made and seconded, the following resolutions were unanimously adopted:

"Be It Resolved: That Norman Thompson be and he is hereby appointed Managing Resident Agent of the corporation on the Island of Guam, with the authority to accept summons and process in all legal proceedings and any notices affecting the corporation, on behalf of the corporation.

"Be It Further Resolved: That Norman Thompson be and he is hereby appointed the Manager of 'Dairy Queen of Guam,' and is vested with full power and authority to operate and conduct such business on behalf of American Pacific Dairy Products, Inc.

"Be It Further Resolved: That by the above action the authority of all previous managing Resident Agents, including Joseph Siciliano and Albert C. Slaughter, is hereby revoked.

"Be It Further Resolved: That the following notice be given to Joseph Siciliano by the President:

Exhibit E—(Continued)

"'Notice of Termination of De Facto Partnership Known as "Dairy Queen of Guam"

"'To: Joseph Siciliano, His Agents, Servants and Attorneys, and to the duly appointed and acting Receiver in the Civil Action of Siciliano v. Siciliano, pending in the Island Court in and for the Territory of Guam, being Civil Case No. 1453.

"'Whereas, on June 23, 1952, Edward Thompson, president of American Pacific Dairy Products, Inc., entered into certain agreements with Joe Siciliano, detailed as:

"'(1) Articles of Co-Partnership,

"'(2) Agreement (as to sale of assets by American Pacific),

"'(3) Assignment of Lease by American Pacific, and

"'(4) Certificate of Co-Partnership transacting business under a fictitious name,

which agreements purported to create a partnership between American Pacific Dairy Products, Inc., and Joe Siciliano, to be known as "Dairy Queen of Guam," all of said agreements being subject to ratification by the board of directors of American Pacific, and that fact being known to Joe Siciliano; and

Exhibit E—(Continued)

"'Whereas, by June 23, 1952, American Pacific had leased property upon which to construct a retail store, had virtually finished the construction of the store, and was ready to start operating the same, and had spent approximately $44,000.00 thereon; and

"'Whereas, Joe Siciliano represented that he could have done the development work and construction of the store for considerably less because of his personal knowledge and skill in such matters as a result of which representations Edward Thompson, president of American Pacific, agreed to reduce the value of the assets of the business from approximately $44,000.00 to $38,026.00 for the purposes of the purported partnership; and

"'Whereas, the primary consideration to American Pacific in entering into said agreements was the acquisition of the personal knowledge, skill and energy of Joe Siciliano, his presence on Guam, his personal management of the business, and his agreement to commence work immediately upon a second store; and

"'Whereas, Joe Siciliano left Guam almost immediately after the agreements referred to were executed and has not returned to Guam since that time, and has devoted none of his time, skill or energy to the affairs of the business; and

"'Whereas, the board of directors of American Pacific at a meeting on October 6, 1952, called for

Exhibit E—(Continued)

the purpose of considering said agreements, by resolution refused to ratify said agreements unless certain reasonable conditions caused by Joe Siciliano's continued absence from Guam and failure to devote his time, skill and energy to the business, were complied with within sixty days, amongst which were the following:

> "'(a) That written assurance be received from Joe Siciliano that if he did not return to Guam and decided to sell his interest in "Dairy Queen," that he would offer his interest to American Pacific, first at the price he paid originally for it;
>
> "'(b) That in the event Joe Siciliano did not personally manage the business then American Pacific would have the right to name a manager, and that Joe Siciliano would give written assurance thereof;
>
> "'(c) That an adequate accounting system would be set up with weekly reports of sales and expenses;
>
> "'(d) That a blanket fidelity bond be arranged for the business in the sum of $20,000.00 to cover all employees; and

"'Whereas, although Joe Siciliano received a copy of said resolution, he has to date made no attempt whatsoever to comply with any of said conditions, but has ignored them altogether; and

Exhibit E—(Continued)

"'Whereas, after American Pacific had waited patiently for more than sixty days and had continuously urged some response from Joe Siciliano with no success, Edward Thompson, president of American Pacific, finally on February 26, 1952, wrote Joe Siciliano a letter setting forth the concern of American Pacific and notifying him that the board of directors would not ratify the agreements because of the failure of Joe Siciliano to comply with the conditions of the resolution referred to above, and further stating concern about the present conditions of the business, and to Joe Siciliano's continued absence from Guam, and further pointing out:

"'(a) the gross inadequacy of the reports received concerning operations;

"'(b) the irregular hours that the store was being operated;

"'(c) the inadequate supervision and management;

"'(d) the declining gross profits on sales due lack of supervision and management;

"'(e) the overstock of supplies;

"'(f) the failure to start work on a second store because of Joe Siciliano's absence;

"'(g) the increasing competition to "Dairy Queen of Guam" by the advent of new stores;

Exhibit E—(Continued)

"'(h) the fact that Edward Thompson had been required to make a personal trip to Guam at considerable expense to American Pacific to help straighten out the affairs of the store; and

"'Whereas, no response has been received whatsoever from Joe Siciliano to said letter, nor has any report on sales or profits been received by American Pacific since December 31, 1952; and

"'Whereas, it is necessary in order to preserve the business that immedate steps be taken to provide adequate management, and supervision, and American Pacific has appointed Norman Thompson to manage the business on its behalf and to be American Pacific's Managing Resident Agent on Guam succeeding all others heretofore appointed;

"'Now, Therefore, you are hereby notified that:

"'(1) The Board of Directors of American Pacific Dairy Products, Inc., refuses to ratify and approve the following agreements entered into in its behalf by Edward Thompson, its president, on June 23, 1952: Articles of Co-partnership; Agreement (as to sale of assets by American Pacific); Assignment of Lease; Certificate of Co-Partnership transacting business under a fictitious name.

"'(2) The de facto partnership heretofore operating the "Dairy Queen of Guam" is hereby terminated effective April 21, 1954.

Exhibit E—(Continued)

"'(3) There is herewith tendered to you, or to the Receiver in the action of Siciliano v. Siciliano presently pending against you, if the court should so order, the sum of Fifteen Thousand Dollars ($15,000.00) representing your initial capital interest in the purported partnership, from funds of the purported partnership on deposit in the Bank of Guam, on the condition that the following documents, to be placed in the hands of said bank, are duly executed: (a) Acceptance of Termination of de facto Partnership known as "Dairy Queen of Guam"; (b) Reassignment to American Pacific of Leases; (c) Agreement Transferring Assets to American Pacific.

"'(4) Norman Thompson has been appointed Managing Resident Agent of American Pacific and Manager of "Dairy Queen of Guam" and demand is hereby made for an accounting to him on behalf of American Pacific, and return of, all funds received in connection with the operation of "Dairy Queen of Guam" other than the sum of $15,000.00 hereinabove tendered to you in the above paragraph.'"

It is also decided to open a new bank account on Guam in the name of American Pacific Dairy Products, Inc., into which all of the funds (other than the $15,000.00 to be tendered to Siciliano) now held in the account of the Dairy Queen should be transferred, and the president, the secretary and the

Exhibit E—(Continued)

resident manager on Guam would each be authorized to withdraw funds therefrom. It was the general concensus of opinion that Mr. Norman Thompson, as resident manager, would only need a relatively small revolving fund in the Guam account to pay monthly expenses, and that most of the remaining cash, if any, and proceeds of current operations could be transferred to the company's bank account in the Bank of California in Seattle. Mr. Norman Thompson was authorized to open the new account.

Duly verified.

[Endorsed]: Filed December 23, 1954.

[Title of District Court and Cause.]

REPLY TO COUNTERCLAIM

Comes now the plaintiff in the above-entitled action and replying to defendants' counterclaim, labelled Cross-Complaint, contained in defendants' answer on file herein, admits, denies and alleges as follows, to wit:

Reply to Counterclaim

I.

Replying to paragraph I of said counterclaim, admits the execution of the documents described in said paragraph I, and denies each and every, all and singular, the other allegations therein contained.

II.

Replying to paragraphs II, III and IV contained in said counterclaim, denies each and every, all and singular the allegation therein contained.

III.

Replying to paragraph V of said counterclaim, admits he received a copy of the resolution therein referred to, and denies each and every, all and singular the other allegations therein contained.

IV.

Replying to paragraphs VI and VII of said counterclaim, denies each and every, all and singular the allegations therein contained.

V.

Replying to paragraph VIII of said counterclaim, admits that he received a purported notice of termination of the partnership and denies each and every, all and singular the other allegations therein contained.

VI.

Replying to paragraphs IX and X contained in said counterclaim, denies each and every, all and singular the allegations therein contained.

Wherefore, plaintiff prays judgment as follows:

1. That defendant take nothing by its counterclaim on file herein.

2. That the plaintiff have judgment as prayed for in his complaint on file herein.

3. And for such other and further relief as to the Court shall seem meet and proper.

/s/ JOHN A. BOHN,

/s/ ROBERT E. DUFFY,
Attorneys for Plaintiff
and Cross-Defendant.

Receipt of Copy acknowledged.

[Endorsed]: Filed January 19, 1955.

[Title of District Court and Cause.]

PRETRIAL ORDER

JOHN A. BOHN, and
ROBERT E. DUFFY,
Attorneys for Plaintiff;

FINTON J. PHELAN, JR.,
Attorney for Defendant.

January 26, 1955, at 9:30 A.M.

I. Pleadings:

Plaintiff's complaint as amended alleges that the plaintiff and defendant entered into a co-partnership agreement under date of June 23, 1952, under the terms of which the parties were to operate an ice cream business in Guam to be known as the Dairy Queen of Guam; that contrary to the agreement the defendant took arbitrary possession of the books and assets of the business on or about April 4,

1953, and continued to operate the same and continues to deny that the plaintiff is a co-partner in the business. The plaintiff prays judgment for the appointment of a receiver, a partnership accounting and other relief.

After numerous motions were disposed of the defendant filed its answer and cross-complaint and alleges that it took possession of the books and assets for the reason that its board of directors had not ratified the partnership agreement. It sets up further defenses and filed a counter-claim in which it alleges in effect that due to the plaintiff's failure to operate the business satisfactorily additional profits had been lost and it became necessary for the defendant to take over the business and to offer to return plaintiff's investment.

The plaintiff filed a reply to the counter-claim in the nature of a general denial.

II. Conference:

At the pretrial conference neither of the parties was in a position to supply the court with information sufficient to draft a comprehensive pretrial order since neither was familiar with the full operation of the business and a comprehensive audit had not been made. In general, however, it appeared that the defendant was interested in establishing a retail outlet for the sale of an ice cream mix involving its formula and the use of its patented equipment. It had attempted to construct a building for

such purpose on leased land, which was nearing completion, but was confronted with a shortage of capital and adequate local management The plaintiff at the time the partnership agreement was entered into was operating a number of successful businesses in Guam through a corporation known as Pacific Enterprises, Inc., of which corporation he was the majority stockholder. In reliance, in large part, upon his managerial ability and the availability of his organization, plus his capital investment, the defendant entered into a partnership agreement with him. He immediately began the process of completing the building for opening and supplied employees for such purpose, but shortly after the business was begun he left for the United States and did not return to Guam for a period of approximately two years. The plaintiff relied upon various members of his organization to provide management and all services, a part of which were duly reimbursed. In a companion case to this, Pacific Enterprises, Inc., vs. the partners doing business under the firm name and style of Dairy Queen of Guam, the plaintiff in that action, No. 68-54 in this court, seeks to obtain reimbursement for corporate expenditures made for the benefit of the partners as shown by its open account.

The defendant contended that due to the prolonged absence of the plaintiff the business was improperly managed and that after making repeated efforts to induce him to return to Guam and to manage the business, it became necessary for the defend-

ant to take over the books and assets of the business and that it thereupon notified the plaintiff that defendant's board of directors had never ratified the partnership agreement and that the plaintiff's investment in the amount of $15,000 would be returned to him. It is conceded that the defendant acted ex parte and did not seek the dissolution of the partnership agreement through court action.

It appears from the defendant's answer and cross-complaint that during the period from the entering into of the partnership agreement until the defendant took over the business, the business made a gross profit during the period when it was under the control of the plaintiff in excess of $81,000.

III. Witnesses for the Plaintiff:

1. The plaintiff will testify as to the execution of the partnership agreement, the payment of his capital contribution, his efforts to establish the business and his failure to receive his share of the profits.

2. Henry Diza, accountant for Pacific Enterprises, Inc., will testify that he kept the books of the partnership business until about June 1, 1953, when they were delivered to the defendant.

3. Joseph Mego will testify that he worked part-time as manager of the business, supervising the delivery of supplies and the general operation until the business was taken over by the defendant.

4. G. C. Balmonte will testify as to the services

made available by himself and others in the operation of the business.

5. Robert Miller or some other accountant to be selected will testify as to the audit of the books.

6. Lyle Turner, a lawyer, will testify as to the circumstances surrounding the entry into the agreement and various admissions made by the defendant as to the operation of the business.

IV. Witnesses for the Defendant:

1. Edward Thompson, the president of the defendant corporation, will testify as to the circumstances surrounding the making of the agreement, his efforts to induce the plaintiff to return to Guam and to manage the business, the general failure to have the business managed properly and the necessity for taking it over.

2. Norman Thompson, the son of Edward Thompson, will testify that he took over the business and the books approximately June, 1953, and the conditions he found in the course of his management of the business.

3. Two employees, names not stated, will testify as to their employment and the inadequate operation of the business.

V. Stipulations:

It is stipulated:

1. Either party may introduce additional witnesses by giving the opposing party written notice

at least five days before trial with an outline of the testimony to be given by such witness.

2. Civil case No. 68-54, Pacific Enterprises, Inc., vs. the partners in this action, shall be consolidated for trial and any material evidence introduced in this action may be considered in determining Civil No. 68-54.

VI. Issues for Trial:

1. Whether the defendant was warranted in interfering with the operation of the business.

2. Whether the defendant has received partnership funds for which it must account to plaintiff.

3. Whether the defendant can rely upon any defense that the partnership agreement was not ratified by its board of directors.

4. Whether it is necessary for the court to appoint a receiver for the operation of the business pending dissolution of the partnership.

VII. Order: It Is Herewith Ordered:

1. The above-entitled action is set for trial February 14, 1955, at 9:30 a.m.

2. The action in Civil Case 68-54, Pacific Enterprises, Inc., vs. these parties, is consolidated with this action for purposes of trial and any evidence material to the issues introduced in the trial of the present action may be considered as having been introduced in connection with the trial of 68-54.

Dated and entered this 26th day of January, A.D. 1955.

/s/ PAUL D. SHRIVER,
Judge.

Approved:

/s/ JOHN A. BOHN,
Attorney for Plaintiff.

/s/ F. J. PHELAN, JR.,
Attorney for Defendant.

[Endorsed]: Filed January 26, 1955.

[Title of District Court and Cause.]

REQUEST FOR ADMISSION OF FACTS

To: John Bohn and Robert Duffy, Esquires, Attorneys for Plaintiff, Agana, Guam.

Please take notice that the defendant, American Pacific Dairy Products, Inc., hereby requests the plaintiff, Joseph A. Siciliano, pursuant to Rule 36 of the Federal Rules of Civil Procedure, to admit, within ten (10) days after service of this request, for the purpose of the above-entitled action only, and subject to all pertinent objections to admissibility which may be interposed at the trial, the truth of the following facts:

1. That prior to the opening of the Dairy Queen of Guam for business, Joseph A. Siciliano provided no services and did no work at the Dairy Queen of Guam.

2. That on the opening day of the Dairy Queen of Guam, Joseph A. Siciliano did nothing other than wait on the counter at the Dairy Queen of Guam.

3. That Joseph A. Siciliano left Guam within ten (10) days of the opening of the Dairy Queen of Guam, and was absent for a period of two (2) years.

4. That Joseph A. Siciliano established a permanent residence in the State of Nevada during his absence.

5. That during the absence of Joseph A. Siciliano, he never visited Guam even for a temporary period.

6. That Joseph A. Siciliano executed no contract on behalf of the Dairy Queen of Guam with Pacific Enterprises, Inc.

7. That Joseph A. Siciliano placed no orders on behalf of the Dairy Queen of Guam with Pacific Enterprises, Inc.

8. That Joseph A. Siciliano is the sole owner of that corporation known as Pacific Enterprises, Inc.

9. That Joseph A. Siciliano did not advise the defendant herein of his sole ownership of Pacific Enterprises, Inc.

10. That Henry Diza is an alien contract employee of Pacific Enterprises, Inc.

11. That Henry Diza is not an officer of Pacific Enterprises, Inc.

12. That Henry Diza was never an officer of Pacific Enterprises, Inc.

13. That Joseph A. Siciliano or Pacific Enterprises, Inc., were never authorized by the United States Immigration and Naturalization Service to work contract alien employees of Pacific Enterprises, Inc., at the Dairy Queen of Guam.

14. That Joseph A. Siciliano owns or controls all the outstanding stock of Pacific Enterprises, Inc.

15. That employees of Pacific Enterprises, Inc., removed from the Dairy Queen of Guam, 2,500 pounds of frozen strawberries, 50 gallons of vanilla extract, sheets of plywood and other building materials, certain motors and condensers and other equipment from the air conditioning plant of the Dairy Queen of Guam.

16. That at the time of entering into the agreement with Mr. Edward Thompson, Joseph A. Siciliano was advised that the agreement was subject to ratification by the Board of Directors of American Pacific Dairy Products, Inc.

17. That Joseph A. Siciliano has part of the business records of the Dairy Queen of Guam for the period July, 1952 through April, 1953.

18. That Joseph A. Siciliano never made a complete accounting of the the funds and business of the Dairy Queen of Guam for the period June, 1952 through April, 1953.

19. That during the period June, 1952 to April, 1953, the agents and servants of Joseph A. Siciliano:

a. Did not maintain daily, weekly or monthly inventories.

b. Did not preserve the daily tapes from the cash register.

c. Did not daily or weekly deposit funds of the Dairy Queen of Guam in the bank account.

d. Frequently and as a regular course of business paid all bills of the Dairy Queen of Guam by cash payment.

20. That during the period June, 1952, to April, 1953, Wallace Veit did not work at the Dairy Queen of Guam.

21. That Pacific Enterprises, Inc., submitted no statement or bill to the Dairy Queen of Guam until the year 1954.

22. That the Dairy Queen of Guam never rented a reefer truck from Pacific Enterprises, Inc.

23. That Pacific Enterprises, Inc., did not issue the Dairy Queen of Guam any supplies.

24. That the Dairy Queen of Guam never used eight ounce (8 oz.) size Lily Cups.

Dated at Agana, Guam, this 2nd day of February, 1955.

/s/ FINTON J. PHELAN, JR.,
Attorney for Defendant.

FINTON J. PHELAN, JR., for
LITTLE, LeSOURD, PALMER,
SCOTT & SLEMMONS,
Attorneys for Defendant.

Receipt of Copy acknowledged.

[Endorsed]: Filed February 2, 1955.

In the District Court of Guam, in and for the Unincorporated Territory of Guam.

Civil Action No. 59-54

JOSEPH A. SICILIANO,

Plaintiff,

vs.

AMERICAN PACIFIC DAIRY PRODUCTS, INC., a Corporation,

Defendant.

Civil Action No. 68-54

PACIFIC ENTERPRISES, INC.,

Plaintiff,

vs.

AMERICAN PACIFIC DAIRY PRODUCTS, INC., and JOSEPH SICILIANO, Co-Partners Doing Business Under the Firm Name and Style of DAIRY QUEEN OF GUAM,

Defendants.

AMENDED CROSS-COMPLAINT IN CIVIL No. 59-54

The defendant, for amended cross-complaint against plaintiff, alleges as follows:

1. Adopts and realleges paragraphs I, II, III, IV, V, VI, VII, VIII, and X of the cross-complaint.

2. Amends the allegations contained in paragraph IX of the cross-complaint as follows:

The defendant suffered irreparable harm and injury to its business on account of the failure of the plaintiff under the de facto partnership heretofore operating to perform any personal service whatsoever or devote any of his personal knowledge, skill or energy to the business. If properly managed and directed the business from the existing store would have amounted to gross sales in the amount of One Hundred Four Thousand Five Hundred Six and 65/100 Dollars ($104,506.65) during the period from June 23, 1952, to April 30, 1953. Because of lack of adequate and proper management and due to unnecessary and needless expenses, the total gross sales of the existing store were only Eighty-one Thousand Three Hundred Sixty-one and 03/100 Dollars ($81,361.03) during this period. Because of the plaintiff not being available and not devoting his personal knowledge, skill and energy to the management of the existing store, and because the plaintiff did not open two new stores as projected and planned in the meetings of June, 1952, the defendant suffered a total loss of gross sales of at least Forty-five Thousand Seven Hundred Seventy-one and 94/100 Dollars ($45,771.94). The responsibility for the management and supervision of the business during this period was that of the plaintiff and he failed completely to discharge that responsibility. Defendant not only performed everything agreed to by it but also defendant's President personally went to Guam to straighten out the business and preserve the investment. As plaintiff has performed no services whatsoever to the de facto part-

nership, the defendant alleges that plaintiff should not be entitled to any of the net profits therefrom and should account fully for all funds received by him from June 23, 1952, to May 12, 1953.

Wherefore, defendant prays for judgment against the plaintiff as follows:

1. For an order confirmed the termination of the de facto partnership heretofore existing between plaintiff and defendant with regard to "Dairy Queen of Guam" as of May 12, 1953.

2. For an order affirming the defendant's right, title, and interest as the sole owner of the "Dairy Queen of Guam."

3. That the plaintiff account for all monies received during the de facto partnership in the operation of "Dairy Queen of Guam."

4. That the Court decree that the plaintiff receive the original Fifteen Thousand Dollars ($15,000.00) investment which he made in the business, less any amounts to which the defendant may be entitled under the accounting prayed for in paragraph 3, and less damages in the sum of Forty-five Thousand Seven Hundred Seventy-one and 94/100 Dollars ($45,771.94) which the defendant has suffered because of plaintiff, including in addition the costs, disbursements, and attorney fees in this action; and further that the defendant receive all the remaining profits and capital interests of "Dairy Queen of Guam."

5. Such other and further relief as the Court may deem proper and lawful.

/s/ FINTON J. PHELAN, JR.,
Attorney for Defendant, American Pacific Dairy Products, Inc.

/s/ FINTON J. PHELAN, JR., for
LITTLE, LeSOURD, PALMER, SCOTT & SLEMMONS,
Attorneys for Defendant, American Pacific Dairy Products, Inc.

[Endorsed]: Filed February 9, 1955.

[Title of District Court and Causes.]

Civil Action Nos. 68-54 and 59-54

DEMAND FOR JURY TRIAL

The defendant, American Pacific Dairy Products, Inc., requests the Court to direct a jury trial of the issues raised by the complaint and the answer filed by this defendant and the issues raised by the counter-claim filed by this defendant, and a jury trial upon the issues raised by the cross-complaint against the co-defendant, Joseph Siciliano, filed by this defendant.

/s/ FINTON J. PHELAN, JR.,
Attorney for Defendant, American Pacific Dairy Products, Inc.

/s/ FINTON J. PHELAN, JR., for
LITTLE, LeSOURD, PALMER,
SCOTT & SLEMMONS,
Attorney for Defendant, American Pacific Dairy Products, Inc.

[Endorsed]: Filed February 9, 1955.

[Title of District Court and Cause.]

Civil Case No. 59-54

OBJECTIONS AND ANSWERS TO REQUESTS FOR ADMISSIONS

Plaintiff herewith presents proposed answers to some of defendant's requests for admissions and his objections to the remainder of said requests as follows, to wit:

I.

That all of defendant's requests for admissions are wholly improper and not timely in that on the 20th day of January, 1955, a pre-trial hearing was had on this case pursuant to an order of the District Court of Guam and that at that time the defendant was given an opportunity to request admissions of facts and of documents, but did fail absolutely and entirely to do so; that the scope of the issues in the case were set in the aforementioned pre-trial hearing, and to permit the requests of defendant for admissions at this time would serve to expand the pre-trial order, result in unnecessary delay and violate the reasons and purposes for a pre-trial hearing.

II.

That the pre-trial order of the Honorable Judge Schriver in the District Court of Guam for the territory of Guam, having been issued on the 26th day of January, 1955, and thereafter not having been objected to by either party to this action, controls the subsequent course of this action, unless within the discretion of the Court it shall otherwise be amended at the time of trial.

III.

That the defendant has had ample opportunity to avail itself of the procedures provided for in Rule 36 of the Federal Rules of Civil Procedure pertaining to requests for admission, and has earlier neglected and refused to do so; that at this time, subsequent to the pre-trial hearing and pre-trial order of the District Court, shortly before the time set for the trial of the action upon its merits the request of the defendant for admissions places an onerous and unfair burden upon the plaintiff.

IV.

That all of the facts for which admissions are requested are controversial facts disputed by the plaintiff, and that the proper procedure to elicit such information is through discovery methods set forth in the Federal Rules of Civil Procedure and not by requests for admissions.

V.

Plaintiff herein for further objection to the requests for admissions served by defendant, states

that he is unable and unwilling to admit the truth of certain requested facts and for the reasons set forth below cited to each fact requested, objects as follows:

(1) That question No. 1 is irrelevant, immaterial and outside of the issues of the case; that the issues as set forth in the pre-trial order of the court are simple and substantially as follows: (a) Whether or not a contract of co-partnership was entered into by the parties? (b) Was the contract of co-partnership violated? (c) Should a receiver be appointed to take charge of the business pending an accounting and order for dissolution? That the said request for admission is not pertinent to these issues.

(2) That question No. 2 is irrelevant, immaterial and outside of the issues of the case; that the issues as set forth in the pre-trial order of the court are simple and substantially as follows: (a) Whether or not a contract of co-partnership was entered into by the parties? (b) Was the contract of co-partnership violated? (c) Should a receiver be appointed to take charge of the business pending an accounting and order for dissolution? That the said request for admission is not pertinent to these issues.

(3) That question No. 3 is irrelevant, immaterial and outside of the issues of the case; that the issues as set forth in the pre-trial order of the court are simple and substantially as follows: (a) Whether or not a contract of co-partnership was entered into by the parties? (b) Was the contract of co-partner-

ship violated? (c) Should a receiver be appointed to take charge of the business pending an accounting and order for dissolution? That the said request for admission is not pertinent to these issues.

(4) That question No. 4 is irrelevant, immaterial and outside of the issues of the case; that the issues as set forth in the pre-trial order of the court are simple and substantially as follows: (a) Whether or not a contract of co-partnership was entered into by the parties? (b) Was the contract of co-partnership violated? (c) Should a receiver be appointed to take charge of the business pending an accounting and order for dissolution? That the said request for admission is not pertinent to these issues.

(5) That question No. 5 is irrelevant, immaterial and outside of the issues of the case; that the issues as set forth in the pre-trial order of the court are simple and substantially as follows: (a) Whether or not a contract of co-partnership was entered into by the parties? (b) Was the contract of co-partnership violated? (c) Should a receiver be appointed to take charge of the business pending an accounting and order for dissolution? That the said request for admission is not pertinent to these issues.

(6) That question No 6 is irrelevant, immaterial and outside of the issues of the case; that the issues as set forth in the pre-trial order of the court are simple and substantially as follows: (a) Whether or not a contract of co-partnership was entered into by the parties? (b) Was the contract

of co-partnership violated? (c) Should a receiver be appointed to take charge of the business pending an accounting and order for dissolution? That the said request for admission is not pertinent to these issues.

(7) That question No. 7 is irrelevant, immaterial and outside the issues of the case; that the issues as set forth in the pre-trial order of the court are simple and substantially as follows: (a) Whether or not a contract of co-partnership was entered into by the parties? (b) Was the contract of co-partnership violated? (c) Should a receiver be appointed to take charge of the business pending an accounting and order for dissolution? That the said request for admission is not pertinent to these issues.

(8) In answer to question No. 8, plaintiff denies that Joseph A. Siciliano is the sole owner of Pacific Enterprises, Inc., but states that as of the dates material to this action he did own all of the shares of the corporation except a few qualifying shares, and further admits that for the purposes of this case only, that he owned, controlled, dominated and was the alter ego of the corporation named in said question.

(9) That question No. 9 is irrelevant, immaterial and outside of the issues of the case; that the issues as set forth in the pre-trial order of the court are simple and substantially as follows: (a) Whether or not a contract of co-partnership was entered into by the parties? (b) Was the contract

of co-partnership violated? (c) Should a receiver be appointed to take charge of the business pending an accounting and order for dissolution? That the said request for admission is not pertinent to these issues.

(10) That question No. 10 is irrelevant, immaterial and outside of the issues of the case; that the issues as set forth in the pre-trial order of the court are simple, and substantially as follows: (a) Whether or not a contract of co-partnership was entered into by the parties? (b) Was the contract of co-partnership violated? (c) Should a receiver be appointed to take charge of the business pending an accounting and order for dissolution? That the said request for admission is not pertinent to these issues.

(11) That question No. 11 is irrelevant, immaterial and outside of the issues of the case; that the issues as set forth in the pre-trial order of the court are simple, and substantially as follows: (a) Whether or not a contract of co-partnership was entered into by the parties? (b) Was the contract of co-partnership violated? (c) Should a receiver be appointed to take charge of the business pending an accounting and order for dissolution? That the said request for admission is not pertinent to these issues.

(12) That question No. 12 is irrelevant, immaterial and outside of the issues of the case; that the issues as set forth in the pre-trial order of the court

are simple, and substantially as follows: (a) Whether or not a contract of co-partnership was entered into by the parties? (b) Was the contract of co-partnership violated? (c) Should a receiver be appointed to take charge of the business pending an accounting and order for dissolution? That the said request for admission is not pertinent to these issues.

(13) That question No. 13 is irrelevant, immaterial and outside of the issues of the case; that the issues as set forth in the pre-trial order of the court are simple, and substantially as follows: (a) Whether or not a contract of co-partnership was entered into by the parties? (b) Was the contract of co-partnership violated? (c) Should a receiver be appointed to take charge of the business pending an accounting and order for dissolution? That the said request for admission is not pertinent to these issues.

(14) In answer to question No. 14, plaintiff denies that Joseph A. Siciliano is the sole owner of Pacific Enterprises, Inc., but states that as of the dates material to this action he did own all of the shares of the corporation except a few qualifying shares, and further admits that for the purposes of this case only, that he owned, controlled, dominated and was the alter ego of the corporation named in said question.

(15) That question No. 15 is irrelevant, immaterial and outside the issues of the case; that the issues as set forth in the pre-trial order of the

court are simple, and substantially as follows: (a) Whether or not a contract of co-partnership was entered into by the parties? (b) Was the contract of co-partnership violated? (c) Should a receiver be appointed to take charge of the business pending an accounting and order for dissolution? That the said request for admission is not pertinent to these issues.

(16) That question No. 16 is irrelevant, immaterial and outside the issues of the case; that the issues as set forth in the pre-trial order of the court are simple, and substantially as follows: (a) Whether or not a contract of co-partnership was entered into by the parties? (b) Was the contract of co-partnership violated? (c) Should a receiver be appointed to take charge of the business pending an accounting and order for dissolution? That the said request for admission is not pertinent to these issues.

(17) Plaintiff denies that he has any of the business records of the Dairy Queen of Guam for the period of July, 1952, through April, 1953.

(18) That question No. 18 is irrelevant, immaterial and outside the issues of the case; that the issues as set forth in the pre-trial order of the court are simple, and substantially as follows: (a) Whether or not a contract of co-partnership was entered into by the parties? (b) Was the contract of co-partnership violated? (c) Should a receiver be appointed to take charge of the business pending

an accounting and order for dissolution? That the said request for admission is not pertinent to these issues, and that question No. 18 is further improper in that it is ambiguous and misleading and is one of the controversial facts in issue at the trial.

(19) That questions Nos. 19 a, 19 b, 19 c, and 19 d are irrelevant, immaterial and outside the issues of the case; that the issues as set forth in the pre-trial order of the court are simple, and substantially as follows: (1) Whether or not a contract of co-partnership was entered into by the parties? (2) Was the contract of co-partnership violated? (3) Should a receiver be appointed to take charge of the business pending an accounting and order for dissolution? That the said request for admission is not pertinent to these issues, and that questions Nos. 19 a, 19 b, 19 c, and 19 d are further improper in that they are ambiguous and misleading and are among the controversial facts in issue at the trial.

(20) That question No. 20 is irrelevant, immaterial and outside the issues of the case; that the issues as set forth in the pre-trial order of the court are simple, and substantially as follows: (a) Whether or not a contract of co-partnership was entered into by the parties? (b) Was the contract of co-partnership violated? (c) Should a receiver be appointed to take charge of the business pending an accounting and order for dissolution? That the said request for admission is not pertinent to these issues.

(21) That question No. 21 is irrelevant, immaterial and outside the issues of the case; that the issues as set forth in the pre-trial order of the court are simple, and substantially as follows: (a) Whether or not a contract of co-partnership was entered into by the parties? (b) Was the contract of co-partnership violated? (c) Should a receiver be appointed to take charge of the business pending an accounting and order for dissolution? That the said request for admission is not pertinent to these issues.

(22) That question No. 22 is irrelevant, immaterial and outside the issues of the case; that the issues as set forth in the pre-trial order of the Court are simple, and substantially as follows: (a) Whether or not a contract of co-partnership was entered into by the parties? (b) Was the contract of co-partnership violated? (c) Should a receiver be appointed to take charge of the business pending an accounting and order for dissolution? That the said request for admission is not pertinent to these issues.

(23) That question No. 23 is irrelevant, immaterial and outside the issues of the case; that the issues as set forth in the pre-trial order of the court are simple, and substantially as follows: (a) Whether or not a contract of co-partnership was entered into by the parties? (b) Was the contract of co-partnership violated? (c) Should a receiver be appointed to take charge of the business pending an accounting and order for dissolution? That the

said request for admission is not pertinent to these issues.

(24) That question No. 24 is irrelevant, immaterial and outside the issues of the case; that the issues as set forth in the pre-trial order of the court are simple, and substantially as follows: (a) Whether or not a contract of co-partnership was entered into by the parties? (b) Was the contract of co-partnership violated? (c) Should a receiver be appointed to take charge of the business pending an accounting and order for dissolution? That the said request for admission is not pertinent to these issues.

/s/ JOSEPH A. SICILIANO.

Subscribed and Sworn to before me this 9th day of February, 1955.

[Seal] /s/ E. L. COREFELL,
Notary Public in and for the
Territory of Guam.

My commission expires 27 July, 1955.

[Endorsed]: Filed February 10, 1955.

In the District Court of Guam in and for the Territory of Guam

Civil Action No. 59-54

JOSEPH A. SICILIANO,

Plaintiff,

vs.

AMERICAN PACIFIC DAIRY PRODUCTS, INC., a Corporation, et al.,

Defendants.

INTERLOCUTORY JUDGMENT

This cause came on regularly for trial before the Court sitting without a Jury on the 14th day of February, 1955, Messrs. John A. Bohn and Robert E. Duffy appeared as attorneys for the plaintiff, and Finton J. Phelan, Jr., Esq., appeared as attorney for the defendant, and the Court having heard the testimony and having examined the proofs offered by the respective parties and being fully advised in the premises and having directed that an interlocutory judgment be entered; now, therefore, by reason of the law and the facts aforesaid:

It Is Ordered, Adjudged and Decreed:

1. That the partnership or joint venture heretofore existing between the plaintiff and the defendant under the firm name and style of Dairy Queen of Guam, be and the same is hereby dissolved.

2. That the plaintiff is entitled to an accounting from the defendant but that the Court takes under advisement the period of time which said accounting should cover, and upon final determination of this matter the Court will make a supplementary order fixing said time and will make such further orders as it deems appropriate as to the disposition of the assets of the partnership or joint venture.

3. That all of the assets of the defendant are hereby placed in the custody of the Court and that Norman Thompson be, and he is hereby appointed Trustee for the Court, to take possession of and to manage and operate the business of the Dairy Queen of Guam under the direction of the Court and subject to such further orders and accountings as may from time to time be required by the Court.

4. That the said Trustee shall continue to operate the business of the Dairy Queen of Guam, provided that all funds of said business now existing or hereafter received shall be impounded in the Agana Branch of the Bank of America National Trust & Savings Association, and withdrawn only for necessary operating expenses of the business.

5. That the defendant and all of its officers, agents and employees be and they are hereby enjoined and restrained from disposing of any of the assets of the defendant including its holdings and interest in a corporation known as Guam Frozen Products, Inc.

6. That unless the parties within five (5) days of the date hereof agree upon a mutually satisfac-

tory accountant to audit the books of the defendant, that the Court will thereafter appoint such an accountant to perform such audit.

7. That the defendant is hereby ordered to produce all of its books, records and papers wherever the same shall be located for the purpose of facilitating and completing the accounting herein provided for.

Dated this 18th day of February, 1955.

/s/ PAUL D. SHRIVER,
Judge of the District Court.

[Endorsed]: Filed February 18, 1955.

[Title of District Court and Cause.]

Civil Case No. 59-54

OPINION

JOHN A. BOHN, and
ROBERT E. DUFFY,
Attorneys for Plaintiff.

FINTON J. PHELAN, JR.,
Attorney for Defendant.

The plaintiff began his action against the defendant for the appointment of a receiver and for a partnership accounting. On June 23, 1952, the plaintiff was a resident of Guam and was president of a Guam corporation known as Pacific Enter-

prises, Inc., of which corporation he was the owner of nearly all except qualifying shares. Because of his energy and business acumen he was recognized as a very successful businessman.

The defendant is a corporation organized and existing under the laws of the State of Washington. Its president, Edward Thompson, together with associates, had caused the corporation to be organized primarily for the purpose of opening a store in Guam to sell at wholesale and retail ice cream products through the use of a patented process. He came to Guam where he contacted the plaintiff. The plaintiff showed him many business courtesies and agreed to act as the corporation's resident agent. At that time there was some discussion of the plaintiff's buying an interest in defendant's business, but the plaintiff expressed the view that the percentage offered him was not sufficient to interest him. The defendant obtained a lease and proceeded to construct its store to be known as the "Dairy Queen." It employed a part-time manager for this purpose.

As the store was nearing completion in June, 1953, Edward Thompson again came to Guam and learned that the part-time manager would not be available. As he was impressed with plaintiff's business ability, he offered, and the plaintiff accepted, a 50 per cent interest in the business. Thompson, acting for the defendant corporation, entered into a co-partnership agreement with the plaintiff under the terms of which each partner

paid into the partnership $15,000.00 in cash or other assets. This agreement was entered into June 23, 1952, and the partnership was to be known as Dairy Queen of Guam with expansion as the partners might agree upon. The agreement provided that the plaintiff was to receive a salary during the period that he acted as manager of the partnership with an increase in salary if a second outlet should be opened. The agreement provided that the defendant would have its officers, agents and employees devote such time as might be mutually agreed upon between the partners and the plaintiff agreed to devote such time as might be mutually agreed upon, "together with his skill and energy, to the best interest of the business of the partnership." (Underscoring supplied.)

Coincident with the partnership agreement, a second agreement was entered into under the terms of which the defendant transferred its interests to the partnership and the partnership agreed to pay off, in addition to capital investment, an amount of $8,026.00 to the defendant. The agreement also provided that plaintiff could participate in any business developed in Okinawa. The lease on the land was duly assigned to the partnership, and the partners executed and filed their certificate of co-partnership for transacting business under a fictitious name.

As of the time these agreements were entered into the situation was perfectly clear. The defend-

ant needed the plaintiff to manage its store in which it had invested nearly all of its corporate capital. In turn the defendant was given the opportunity to invest in what proved to be a very profitable business. For his $15,000.00 and an additional $4,000 to be paid out of profits he received a fifty per cent interest in a now and challenging business enterprise along the lines of his business experience and aptitude. The salary to be paid to him was a liberal one in view of the time he would be required to spend in management, and in turn the defendant was satisfied that managerial responsibilities were in competent hands. The plaintiff immediately assumed his managerial responsibilities and in addition to his personal services used employees of Pacific Enterprises, Inc., to complete the store for opening and operation. Thompson left Guam two or three days after the agreements were executed.

But the plaintiff became involved in domestic difficulties and left Guam about a week after the agreements were executed. He left instructions with the management personnel of Pacific Enterprises, Inc., to carry on the partnership business in addition to their other duties, but before leaving he arranged for the construction of a building in connection with the partnership store for the sale of sandwiches and soft drinks. He contended that this was built with Thompson's knowledge and consent as part of the partnership, but Thompson denied this. In a companion case, Pacific Enterprises, Inc.,

vs. the partners, the court wrote down the value of this building to correspond to what the court considered its value to the partnership since it was never used for its intended purpose. In that case Pacific Enterprises, Inc., was given judgment for amounts expended by it for the partnership including the reduced cost of the building.

Upon reaching San Francisco in July, 1952, the plaintiff telephoned Thompson and informed him that he would be gone from Guam for about two months, but in actuality he did not return for about two years. However, the partnership business was carried on by the employees of Pacific Enterprises, Inc. Funds were forwarded to Thompson. Books were kept and reports accepted by the defendant which indicate that during the first year of operation the business made a gross profit equal to the entire capital investment of the partners. Thompson was in contact with the plaintiff and made every reasonable effort to induce him to return and no action was taken to liquidate the partnership until many months after this situation was known to exist; then the defendant indulged in what the court characterized as a "fiction" and attempted to nullify the agreements upon the ground that its board of directors had not ratified them. The defendant took full advantage of the services being performed by Pacific Enterprises, Inc., and accepted the benefits of a successful operation; it has not accounted for any profits during such period. The contention that the agreements were not ratified is disposed of in a let-

ter written by Thompson to plaintiff's representative in Guam under date of October 9, 1952 (Plaintiff's Exhibit No. 7) in which he advised that the agreements had been approved with certain qualifications to help the plaintiff in his troubles.

In April, 1953, Thompson sent his son to Guam with instructions to assist Pacific Enterprises, Inc., or more specifically, its officers and employees who were managing the partnership business. But the conditions under which the business was being operated were such that the son took over the management of the partnership and its existing records. Among such conditions were:

(a) The sanitary conditions at the store were not good.

(b) The cash receipts were not deposited daily but the bags containing returns were kept in the safe with Pacific Enterprises' funds, oftentimes in large amounts.

(c) The books for the partnership had not been posted for a long period of time; consequently monthly reports were delayed.

(d) There was an intermingling of accounts in that Pacific Enterprises, Inc., was furnishing supplies and services for which no charges were currently being posted as debits against the partnership.

(e) The store was being operated irregularly with insufficient controls.

(f) In addition to the foregoing the evidence showed that a cash register had broken down and was not replaced or repaired for a long period of time.

The defendant then abandoned its efforts to get the plaintiff to return and took exclusive control of the partnership business. As of July 1, 1953, it had taken full control, had established its own set of books and was operating the business as a sole corporate enterprise. The record does not show that the plaintiff objected to this, nor does it show that the defendant made reports or in any way treated the plaintiff as a partner after that date. The plaintiff delayed until September, 1954, to begin his action.

The plaintiff contends that the partnership agreement did not require him to act as manager but merely provided for his compensation while employed as manager. While it is true that the agreement could be more explicit, no provision is made in the agreement for any other manager or for selecting any other manager. The plaintiff was in Guam; Thompson was to be in Seattle, Washington. The entire agreement contemplated that the defendant relied upon the plaintiff to provide his services and initiative in carrying on the business. This is further evidenced by paragraph 13 (a) of the agreement which provides that the salary of the plaintiff should cease at the time of his death. It is inconceivable that if the plaintiff was not obligated to manage the business that no provision

would have been made for the appointment of another manager. While the agreement makes provision for the withdrawal of a partner, neither of the parties attempted to follow these provisions. This court is of the view that while no damages were shown as a result of the breach, the plaintiff breached his agreement as of July 1, 1952, but continued as a full partner until July 1, 1953, when the defendant excluded him and took over the business.

The court first concludes that it has jurisdiction over the parties and the subject matter. The court is not concerned as to whether the partnership agreement was ultra vires the powers of the defendant:

> Even where a corporation is without authority under its charter to form a partnership with another it may be held liable as a partner to prevent injustice. Mervyn Investment Co. vs. Biber, 184 Cal. 637.

In the court's view whether this was a partnership or a joint venture, the rights of the parties are governed by Section 2432, Civil Code of Guam.[1]

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[1]Section 2432. Rights of partners to application of partnership property.

(1) When dissolution is caused in any way, except in contravention of the partnership agreement, each partner, as against his co-partners and all persons claiming through them in respect of their interests in the partnership, unless otherwise agreed, may have the partnership property applied to dis-

This section was taken from the Civil Code of California and now appears as Section 15038 of the Corporation Code of California. As such it may be construed in the light of California decisions, at least those in existence when the provision was adopted, United States vs. Johnson, 9 Cir., 181 F. 2d 577. The leading California case is Zeibak vs. Nasser, 12 C. 2d 1, which was decided after the adoption of the Guam codes but involved a joint venture entered into before such adoption. It is

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charge its liabilities, and the surplus applied to pay in cash the net amount owing to the respective partners. But if dissolution is caused by expulsion of a partner, bona fide under the partnership agreement, and if the expelled partner is discharged from all partnership liabilities, either by payment or agreement under Section 2430, paragraph (2), he shall receive in cash only the net amount due him from the partnership.

(2) When dissolution is cause in contravention of the partnership agreement the rights of the partners shall be as follows:

(a) Each partner who has not caused dissolution wrongfully shall have:

I. All the rights specified in paragraph (1) of this section, and

II. The right, as against each partner who has caused the dissolution wrongfully, to damages for breach of the agreement.

(b) The partners who have not caused the dissolution wrongfully, if they all desire to continue the business in the same name, either by themselves or jointly with others, may do so, during the agreed term for the partnership and for that purpose may possess the partnership property; provided they secure the payment by bond approved by the court,

recognized that while subsequent California decisions do not necessarily control, Anderson vs. United States, 9 Cir., 157 F. 2d 429, it is believed that the decision correctly states the law, regardless of when it was handed down. The following general principles are taken from the syllabus:

(2) Joint Ventures—Statutory Construction. The rights and liabilities of joint adventurers, as between themselves, are governed by the same principles which apply to a partnership; and section 2432 of the Civil Code, which relates to the rights of part-

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or pay to any partner who has caused the dissolution wrongfully, the value of his interest in the partnership at the dissolution, less any damages recoverable under clause (2) (a) II of this section, and in like manner indemnify him against all present or future partnership liabilities.

(c) A partner who has caused the dissolution wrongfully shall have:

I. If the business is not continued under the provisions of paragraph (2) (b) all the rights of a partner under paragraph (1), subject to clause (2) (a) II of this section.

II. If the business is continued under paragraph (2) (b) of this section the right as against his co-partners and all claiming through them in respect of their interests in the partnership to have the value of his interest in the partnership less any damages caused to his co-partners by the dissolution, ascertained and paid to him in cash, or the payment secured by bond approved by the court, and to be released from all existing liabilities of the partnership; but in ascertaining the value of the partner's interest the value of the good will of the business shall not be considered.

ners on dissolution, is not confined in operation to partnerships, but is applicable in the case of dissolution of joint ventures.

(5) Dissolution—Wrongful Conduct—Statutory Construction.

Section 2432 of the Civil Code, which provides the rights and remedies of the partners when a dissolution has been effected because of the wrongful conduct of one of the partners, is applicable even though the actual dissolution is effected by a decree of court, when such dissolution is caused by the wrongful conduct of a partner in contravention of the partnership agreement, and the court decrees the dissolution because of such wrongful conduct.

(8) Remedies—Procedure—Statutory Construction—Due Process—Constitutional Law.

Section 2432 of the Civil Code, relating to the rights of partners on dissolution, is purely remedial in that it provides for a mode of procedure which a partner must be deemed to have consented to when he entered into his undertakings; and in said action, where plaintiff was afforded the right to have his cause tried and determined under the same rules of procedure that are applied to similar actions brought pursuant to the Uniform Partnership Law, and he invoked the process of the law himself, he could not complain that his property was taken from him without due process of law under said act, in that he was denied one-half the value of the good will.

The Zeibak case involved a joint venture. Zeibak put up part of the capital but the Nassers at all times managed the venture. The trial court held that Zeibak had violated the joint venture agreement, but held that he was entitled to his interest as of the date of the court's decree of dissolution; the Nassers contended that Zeibak's interest should have been determined as of the date of his breach. In affirming the trial court, the court said, p. 16:

"Although this finding might well have been more clearly phrased, any apparent ambiguity therein is completely dispelled by the words of the trial court just referred to. Throughout the findings, conclusions of law, and into the final judgment the trial court consistently adhered to the date July 20, 1934, as the date upon which plaintiff's interest should be ascertained. Furthermore, it may be said that after December 11, 1932, the acts and conduct of the defendants were wholly inconsistent with a recognition upon their part that they considered the venture had been dissolved ipso facto as of that date. Notwithstanding the fact that on one occasion the defendants informed plaintiff that they considered he had breached the partnership agreement by his failure to sign the agreement upon that day, up to the date of trial, the parties continually negotiated, each with the other, looking to a settlement of their differences, and during the entire time, to all intents and purposes they resumed and continued the partnership relation."

In the instant case just the opposite is true. The plaintiff, having breached his agreement, forced the defendant to protect itself by taking over the partnership assets. Prior to this step the defendant had made every reasonable effort to induce the plaintiff to comply and to leave the door open for his return. But having taken the step, under what the court considers the erroneous assumption that the plaintiff had never been a partner, the business was operated by the defendant to the complete exclusion of the plaintiff. The defendant caused a second store to be opened and purchased 70 per cent of the stock in the local corporation formed for such purpose, using partnership funds for such purpose but taking the stock in defendant's name. While, as pointed out previously, the defendant did not show damage as a result of the plaintiff's breach since the business prospered, it is entirely within the realm of conjecture as to whether greater profits would not have been made if the plaintiff had been present to manage the operation.

The court therefore is of the view that the parties dissolved their partnership as between themselves on July 1, 1953, and that the plaintiff's interests should be determined as of that date without reference to the value of the good will of the business. But since the defendant continued to use the profits and capital investment of the plaintiff for its own purposes it would seem that the plaintiff is entitled to interest on the amount found to be due him on July 1, 1953, at six per cent per annum until paid. The evidence

shows that the business continued to make a profit until September, 1954, when the plaintiff began his action.

Counsel for the plaintiff shall prepare findings and conclusions and settle with counsel for defendant in 20 days, together with an appropriate decree and order for determining the plaintiff's interests consistent with the opinion.

Dated and entered this 2d day of March, A.D. 1955.

/s/ PAUL D. SHRIVER,
Judge.

[Endorsed]: Filed March 2, 1955.

[Title of District Court and Cause.]

Civil No. 59-54

NOTICE OF APPEAL

Notice is hereby given that American Pacific Dairy Products, Inc., a corporation, the defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit, from the interlocutory judgment and restraining order entered in this action on the 18th day of February, 1955.

Dated at Agana, Guam, this 17th day of March, 1955.

/s/ FINTON J. PHELAN, JR.,
Attorney for Defendant, American Pacific Dairy Products, Inc.

/s/ FINTON J. PHELAN, JR., For
LITTLE, LeSOURD, PALMER,
SCOTT & SLEMMONS,
Attorneys for Defendant, American Pacific Dairy Products, Inc.

[Endorsed]: Filed March 19, 1955.

[Title of District Court and Cause.]

Civil No. 59-54

SUPPLEMENTAL FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The court's memorandum opinion was filed March 2, 1955, and the court adopts such memorandum opinion as its findings of fact and conclusions of law as supplemented herein.

2. The bookkeeper for Pacific Enterprises, Inc., prepared monthly financial statements, cumulative in nature, in accordance with defendant's instructions, and the defendant accepted such statements as being correct.

3. The financial statement from June 22, 1952, to May 31, 1953, showed a cumulative net profit to the partnership of $31,403.47.

4. During the month of June, 1953, the business was under the control of the defendant and the defendant did not submit a financial statement for such month which would be accepted as accurate.

The average net profit per month was approximately $2,850.00. It is considered that with increased cost due to the manager, the net profit for the month of June, 1953, was $2,350.00, or a total undistributed net profit as of July 1, 1953, of $33,753.49.

5. In the case of Pacific Enterprises, Inc., vs. American Pacific Dairy Products, Inc., and Joseph Siciliano, Civil No. 68-54, which was consolidated for trial with the present case, the court entered judgment for the plaintiff in the amount of $6,534.55, representing the cost of materials, services and supplies furnished to the partnership. Of this amount $2,300.00 represented the value to the partnership of a building constructed adjacent to the partnership building on land leased to the partnership, but the value of such building was not carried on the partnership books. An additional amount of $1,234.95 represented quarters and board for partnership employees furnished subsequent to July 1, 1953.

6. That in addition to the initial capital investment of the partners, there was an account owing to a contractor for the construction of the partnership building in the amount of $8,000.00, and the partners agreed that this amount was to be paid out of the profits of the business. Such amount was paid out of gross profits and the capital assets increased by such payment. Depreciation on the capital assets was regularly written off in accordance with the partnership agreement.

7. The defendant used capital and profits to invest in a corporation known as Guam Frozen Products, Inc., which was competitive to the partnership, subsequent to July 1, 1953, without plaintiff's knowledge or permission and no effort was made by either partner to dissolve the partnership in accordance with the partnership agreement.

8. The plaintiff was excluded from any voice in or management of the partnership business as of July 1, 1953, and it is not practical to permit dissolution of the partnership to be delayed since the partnership agreement contains no termination date.

9. The defendant offered no evidence in support of its counterclaim and such counterclaim should be dismissed.

10. At the time the plaintiff was excluded from the partnership, as of July 1, 1953, he was entitled to the following:

(a)	Return of Capital	$15,000.00
(b)	Capital improvements paid out of profits	4,000.00
(c)	One-half value of additional building	1,150.00
(d)	One-half net profit	16,876.75
		$37,026.75
	Less one-half judgment after deducting $1,234.95	2,649.80
	Balance	$34,376.95

11. The plaintiff is entitled to interest at six per cent per annum on $34,376.95 for the use of his capital and profits from July 1, 1953, to the date of the entry of judgment.

Conclusions of Law

1. The court has jurisdiction of the parties and the subject matter of the action under Section 1424, Title 28, U.S.C. and Section 62, Code of Civil Procedure of Guam.

2. The partnership of the parties was dissolved by exclusion of the plaintiff because of his breach and acquiesence in such exclusion as of July 1, 1953.

3. The defendant is entitled to no relief under its cross-complaint.

4. The plaintiff is entitled to judgment against the defendant in the amount of $34,376.95 with interest at six per cent per annum from July 1, 1953, to the date of entry of judgment.

5. The plaintiff is entitled to the appointment of a receiver unless the judgment is paid within 30 days from the entry thereof.

6. Upon payment of the judgment the defendant is entitled to have transferred to it the plaintiff's interest in the leasehold and other assets of the partnership.

Dated and filed this 7th day of April, A.D. 1955.

/s/ PAUL D. SHRIVER,
Judge.

[Endorsed]: Filed April 7, 1955.

District Court of Guam
Territory of Guam

Civil No. 59-54

JOSEPH A. SICILIANO,

Plaintiff,

vs.

AMERICAN PACIFIC DAIRY PRODUCTS, INC., a Corporation,

Defendant.

JUDGMENT

The court having heretofore filed its Findings of Fact and Conclusions of Law in the above-entitled action, it is herewith

Ordered, Adjudged and Decreed:

1. The co-partnership or joint venture heretofore existing between Joseph A. Siciliano and American Pacific Dairy Products, Inc., is herewith dissolved as between the parties as of July 1, 1953.

2. The plaintiff, Joseph A. Siciliano, shall have judgment against the defendant, American Pacific Dairy Products, Inc., in the amount of $34,376.95 with interest at six per cent per annum from July 1, 1953, to April 7, 1955, in the amount of $3,646.36 and costs of suit in the amount of Sixty and 45/100 Dollars ($60.45).

3. The defendant shall take nothing by its cross-complaint.

4. The interlocutory judgment heretofore entered shall remain in effect to preserve assets, but if the judgment entered herein is not paid within 30 days from April 7, 1955, the plaintiff, Joseph A. Siciliano, upon application, shall be entitled to a receiver to collect the judgment.

5. The plaintiff, upon payment of the judgment, shall transfer to the defendant all of his interest in the partnership assets, including the leasehold interest.

Dated and entered of record this 7th day of April, A.D. 1955.

/s/ PAUL D. SHRIVER,
Judge.

[Endorsed]: Filed and entered April 7, 1955.

[Title of District Court and Cause.]

Civil No. 59-54

MOTION

The defendant, American Pacific Dairy Products, Inc., a corporation, moves the court to stay the enforcement in the judgment in this action pending the disposition of the defendant's appeal to the United States Court of Appeals for the Ninth Circuit, and for that purpose to fix the amount of the bond required to be filed by the defendant.

Dated at the City of Agana, unincorporated territory of Guam, this 16th day of April, 1955.

/s/ FINTON J. PHELAN, JR.,
Attorney for Defendant.

LITTLE, LeSOURD, PALMER,
SCOTT & SLEMMONS,
Attorneys for Defendant.

By /s/ FINTON J. PHELAN, JR.

Approved: for $40,000.00.

/s/ PAUL D. SHRIVER,
Judge of the District Court of Guam.

[Endorsed]: Filed April 18, 1955.

[Title of District Court and Cause.]

Civil No. 59-54

NOTICE OF APPEAL

Notice is hereby given that American Pacific Dairy Products, Inc., a corporation, the defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the judgment entered in this action on the 7th day of April, 1955.

Dated at Agana, unincorporated territory of Guam, this 30th day of April, 1955.

/s/ FINTON J. PHELAN, JR.,
Attorney for Defendant, American Pacific Dairy Products, Inc.

/s/ FINTON J. PHELAN, JR., for
LITTLE, LeSOURD, PALMER, SCOTT & SLEMMONS,
Attorneys for Defendant, American Pacific Dairy Products, Inc.

[Endorsed]: Filed April 30, 1955.

[Title of District Court and Cause.]

Civil Number 59-54

SUPERSEDEAS AND COST BOND ON APPEAL

Know All Men by These Presents:

That We, American Pacific Dairy Products, Inc., above named, as principal, and Hartford Accident and Indemnity Company, a corporation organized under the laws of the State of Connecticut, and authorized to transact the business of surety in the Territory of Guam, as surety, are held and firmly bound unto Joseph A. Siciliano, the plaintiff above named, in the just and full sum of Forty Thousand and No/100 ($40,000.00) Dollars, for which sum, well and truly to be paid, we bind ourselves, our

and each of our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and Dated this 25th day of April, 1955.

The Condition of This Obligation Is Such, That Whereas, the above-named Joseph A. Siciliano on the 7th day of April, A.D. 1955, in the above-entitled action and court, recovered judgment against the American Pacific Dairy Products, Inc., above named .....

And Whereas, the above-named principal has heretofore given due and proper notice that it appeals from said decision and judgment of said District Court of Guam to the 9th Circuit Court.

Now, Therefore, if the said principal, American Pacific Dairy Products, Inc., shall pay to Joseph A. Siciliano, the plaintiff above named, all costs and damages that may be awarded against it on the appeal, or on the dismissal thereof, and shall satisfy and perform the judgment or order appealed from, in case it shall be affirmed, and any judgment in order which the said 9th Circuit Court may render or make, or order to be rendered or made by said District Court of Guam, then this obligation to be void; otherwise to remain in full force and effect.

AMERICAN PACIFIC DAIRY PRODUCTS, INC.,

By /s/ GEORGE A. HENRYE,
Vice-President.

[Seal] HARTFORD ACCIDENT AND
INDEMNITY COMPANY,

By /s/ GERALD L. PERRY,
Attorney-in-Fact.

Approved May 2, A.D. 1955.
/s/ PAUL D. SHRIVER,
Judge.

Hartford Accident and Indemnity Company
Hartford, Connecticut

Power of Attorney

Know all men by these Presents, That the Hartford Accident and Indemnity Company, a corporation duly organized under the laws of the State of Connecticut, and having its principal office in the City of Hartford, County of Hartford, State of Connecticut, does hereby make, constitute and appoint Gerald L. Perry, of Seattle, Washington, its true and lawful Attorney(s)-in-fact, with full power and authority to sign, execute and acknowledge any and all bonds and undertakings on behalf of the Company in its business of guaranteeing the fidelity of persons holding places of public or private trust; guaranteeing the performance of contracts other than insurance policies; guaranteeing the performance of insurance contracts where surety bonds are accepted by states or municipalities, and executing or guaranteeing bonds and undertakings required or permitted in all actions or proceedings or by law

allowed, and to bind the Hartford Accident and Indemnity Company thereby as fully and to the same extent as if such bonds and undertakings and other writings obligatory in the nature thereof were signed by an Executive Officer of the Hartford Accident and Indemnity Company and sealed and attested by one other of such officers, and hereby ratifies and confirms all that its said Attorney(s)-in-fact may do in pursuance hereof.

This power of attorney is granted under and by authority of the following Bylaw adopted by the Stockholders of the Hartford Accident and Indemnity Company at a meeting duly called and held on the 10th day of February, 1943.

Article IV.

Section 8. The President or any Vice-President, acting with any Secretary or Assistant Secretary, shall have power and authority to appoint, for purposes only of executing and attesting bonds and undertakings and other writings obligatory in the nature thereof, one or more Resident Vice-Presidents, Resident Assistant Secretaries and Attorneys-in-fact and at any time to remove any such Resident Vice-President, Resident Assistant Secretary, or Attorney-in-fact, and revoke the power and authority given to him.

Section 11. Attorneys-in-fact shall have power and authority, subject to the terms and limitations of the power of attorney issued to them, to execute

and deliver on behalf of the Company and to attach the seal of the Company thereto any and all bonds and undertakings, and other writings obligatory in the nature thereof, and any such instrument executed by any such Attorney-in-fact shall be as binding upon the Company as if signed by an Executive Officer and sealed and attested by one other of such Officers.

In Witness Whereof, the Hartford Accident and Indemnity Company has caused these presents to be signed by its Vice-President, and its corporate seal to be hereto affixed, duly attested by its Assistant Secretary, this 20th day of April, 1948.

[Seal] HARTFORD ACCIDENT AND INDEMNITY COMPANY,

/s/ WALLACE STEVENS,
Vice-President.

Attest:

/s/ D. C. MACKINNON,
Assistant Secretary.

State of Connecticut,
County of Hartford—ss.

On this 20th day of April, A.D. 1948, before me personally came Wallace Stevens, to me known, who being by me duly sworn, did depose and say: that he resides in the County of Hartford, State of Connecticut; that he is the Vice-President of the Hartford Accident and Indemnity Company, the

corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to the said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation and that he signed his name thereto by like order.

[Seal] /s/ FELIX M. DEL GRECO,
Notary Public.

My commission expires 4-1-59.

Certificate

State of Connecticut,
County of Hartford—ss.

I, the undersigned, Secretary of the Hartford Accident and Indemnity Company, a Connecticut Corporation, Do Hereby Certify that the foregoing and attached Power of Attorney remains in full force and has not been revoked; and furthermore, that Article IV, Sections 8 and 11, of the Bylaws of the Company, set forth in the Power of Attorney, is now in force.

Given under my hand and the seal of the company, at the City of Hartford, on April 25, 1955.

/s/ [Indistinguishable],
Secretary.

[Endorsed]: Filed May 2, 1955.

[Title of District Court and Cause.]

Civil No. 59-54

NOTICE OF APPEAL

Notice is hereby given that Joseph A. Siciliano, above-named plaintiff, does hereby appeal to the Court of Appeals for the Ninth Circuit from those parts of the final judgment,

(1) That fixed the date of July 1, 1953, as the date of dissolution of the co-partnership and limited the accounting of profits from the defendant to that date,

(2) And that limited plaintiff's recovery to profits of the co-partnership as of July 1, 1953, and failed to award plaintiff a share of profits earned to February 18, 1955, and failed to order sale of co-partnership property and distribution of assets between the parties and allow plaintiff his share therein.

Said final judgment was entered in this Action on April 7, 1955.

/s/ JOHN A. BOHN,
Attorney for Appellant,
Joseph A. Siciliano.

[Endorsed]: Filed May 5, 1955.

[Title of District Court and Cause.]

Civil No. 59-54

ORDER

Taxing Costs

The defendant, American Pacific Dairy Products, Inc., a corporation, having objection to the Bill of costs of plaintiff, the matter coming on for a hearing before the court on Friday the 6th Day of May, 1955, Finton J. Phelan, Jr., Esq., appearing for Defendant and Joseph J. Novak, Esq., appearing for Plaintiff. The Court having considered the matter it is:

Ordered that the following items be allowed.

Filing Fee	$15.00
Notary Fee	3.00
Marshal's Fee	4.00
Copy of Deposition of Henry Digo	7.00
Copy of Deposition of Joseph Siciliano	9.25
Reporter's Transcript Fee	2.20
Statutory Attorney Fees	20.00
Total	$60.45

That all other items of costs be disallowed and that as herein allowed the clerk insert in the judgment costs in the sum of $60.45.

Dated this 25th day of May, 1955.

/s/ PAUL D. SHRIVER,
Judge of the District Court of Guam.

[Endorsed]: Filed May 25, 1955.

[Title of District Court and Cause.]

Civil Action No. 59-54

BOND FOR COSTS ON APPEAL

We, the undersigned, jointly and severally acknowledge that we and our personal representatives are bound to pay to the American Pacific Dairy Products, Inc., defendant, the sum of Two Hundred Fifty ($250.00) Dollars.

The condition of this bond is that, whereas the plaintiff has appealed to the Court of Appeals for the Ninth Circuit by notice of appeal filed May 5, 1955, from the judgment of this court entered April 7, 1955, if the plaintiff shall pay all costs adjudged against him if the appeal is dismissed or the judgment affirmed or such costs as the Appellate Court may award if the judgment is modified, then this bond is to be void, but if the plaintiff fails to perform this condition, payment of the amount of this bond shall be due forthwith.

/s/ JOSEPH SICILIANO,
Plaintiff,
Address Tamuning, Guam.

/s/ JAMES W. FERRANTE,
Surety,
Address Tamuning, Guam.

/s/ G. M. O'KEEFE,
Surety;
Address Agana Heights,
Guam.

Signed and acknowledged before me this 31st day of May, 1955.

/s/ [Indistinguishable],
Notary Public in and for the
Territory of Guam.

My commission expires December 13, 1956.

JUSTIFICATION OF SURETIES

Territory of Guam,
Municipality of Agana—ss.

Joseph Siciliano, James W. Ferrante, G. M. O'Keefe, being severally duly sworn, each for himself, doth depose and say, that he is a resident and freeholder within the territory of Guam, and that he is worth the sum of Two Hundred Fifty ($250.00) Dollars, over and above all of his just debts and liabilities which he owes and has incurred, and his property is exempt from execution.

/s/ JOSEPH SICILIANO,

/s/ JAMES W. FERRANTE,

/s/ G. M. O'KEEFE.

Subscribed and sworn to before me this 31st day of May, 1955.

[Seal] /s/ [Indistinguishable],
Notary Public in and for the
Territory of Guam.

My commission expires: December 13, 1956.

[Endorsed]: Filed June 4, 1955.

[Title of District Court and Cause.]

Civil No. 59-54

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY

Defendant-Appellant herewith presents the statement of points upon which appellant intends to rely on appeal:

1. The court erred in entering judgment for the plaintiff against the defendant in that said judgment is contrary to the law, contrary to the evidence and is not supported by the weight of admissible evidence.

2. The court committed error in making Supplemental Finding of Fact No. 2 on the ground that said finding is contrary to the evidence.

3. The court committed error in making Supplemental Finding of Fact No. 4, finding that the undistributed net profit as of July 1, 1953, was $33,-753.49, in that said finding is contrary to the law and is not supported by the weight of competent evidence.

4. The court erred in entering Supplemental Finding of Fact No. 5 on the ground that the judgment in the case of Pacific Enterprises, Inc., vs. American Pacific Dairy Products, Inc., and Joseph Siciliano, Civil No. 68-54, was contrary to the law, and contrary to the evidence, all as more particu-

larly stated in the designation of points to be relied on in said case.

5. The court erred in entering Supplemental Finding of Fact No. 6 in that it was contrary to the weight of competent evidence and is not supported by the evidence.

6. The court committed error in making Supplemental Finding of Fact No. 10, finding that the plaintiff was entitled to $34,376.95 as his share in the purported partnership in that said finding is contrary to the law, contrary to the evidence and not supported by the weight of competent evidence, particularly in allowing plaintiff Items b, c, and d and also allowing one-half of the judgment on the ground that the claim of the Dairy Queen for the sum of $1,066.28 should not be deducted from said judgment, having been included previously in the plaintiff's share of the profit, and also to the allowance of any claim against the defendant.

7. The court erred in entering Supplemental Finding of Fact No. 11 and Supplemental Conclusion of Law No. 4, that the plaintiff was entitled to interest on the amount of $34,376.95 at the rate of 6% from July 1, 1953, to the date of the entry of this judgment, as such is contrary to the law and to the weight of evidence.

8. The court erred in entering Supplemental Conclusion of Law No. 1 in that said conclusion is contrary to the law.

9. The court erred in holding that the partnership agreement had been ratified by the defendant, as such conclusion is contrary to the law and not supported by the competent evidence in that there is no evidence to support a finding of ratification other than the conditional ratification set forth in defendant's Exhibit E.

10. The court erred in ignoring the separate corporate entity of the defendant corporation and in admitting in evidence plaintiff's Exhibit 7, and in concluding that such exhibit showed corporate ratification.

11. The court erred in concluding that the plaintiff continued as a full partner until July 1, 1953, although he breached the agreement as of July 1, 1952, as such conclusion is contrary to the law and is not supported by the weight of competent evidence.

12. The court erred in entering Supplemental Findings of Fact and Conclusions of Law and Judgment on April 7, 1955, without notice to the defendant, contrary to the terms of the interlocutory judgment entered the 18th day of February, 1955, providing for an accounting between the respective parties.

13. The court erred in denying defendant's motions for change of venue and to dismiss for lack of jurisdiction.

14. The court erred in denying the defendant's demand for a jury trial.

15. The court erred in refusing to grant defendant's motion to dismiss at the end of plaintiff's case.

/s/ FINTON J. PHELAN, JR.,
Attorney for Defendant, American Pacific Dairy Products, Inc.

/s/ BURLMAN ADAMS,
LITTLE, LeSOURD, PALMER,
SCOTT & SLEMMONS,
Attorneys for Defendant, American Pacific Dairy Products, Inc., Seattle, Washington.

[Endorsed]: Filed June 20, 1955.

[Title of District Court and Cause.]

Civil Action No. 59-54

ANSWERS TO REQUESTS FOR ADMISSIONS

Comes now the plaintiff and pursuant to the order of the Court, presents herewith his answers to certain questions propounded by defendant:

1. Plaintiff denies the truth of the question asked as No. 1.

2. Plaintiff denies the truth of the question asked as No. 2.

3. Plaintiff admits the truth of the question asked as No. 3.

4. Plaintiff admits that he established a residence in Nevada for divorce purposes but further states that he maintained his home and all of his investments intact in Guam; did intend to return to Guam, and did in fact return to Guam.

5. Plaintiff admits the truth of the question asked as No. 5.

6. Plaintiff admits that he executed no written contract between the Dairy Queen of Guam and Pacific Enterprises, Inc.

7. Plaintiff denies the truth of the question asked as No. 7.

15. Plaintiff denies the truth of the question asked as No. 15.

16. Plaintiff denies the truth of the question asked as No. 16.

17. Plaintiff denies the truth of the question asked as No. 17.

/s/ JOSEPH SICILIANO.

Subscribed and Sworn to before me this 14th day of February, 1955.

[Seal] /s/ E. L. COREFELL,
Notary Public in and for the
Territory of Guam.

My commission expires July 27, 1955.

[Endorsed]: Filed June 23, 1955.

District Court of Guam
Territory of Guam
Civil Case No. 59-54

Before: The Honorable Paul D. Shriver, Judge.

JOSEPH A. SICILIANO,

Plaintiff,

vs.

AMERICAN PACIFIC DAIRY PRODUCTS, INC., a Corporation,

Defendant.

TRANSCRIPT OF PROCEEDINGS
February 14, 1955

Appearances:

For the Plaintiff:
JOHN A. BOHN,
Attorney at Law.

For the Defendant:
FINTON J. PHELAN, JR.,
Attorney at Law.

Monday, February 14, 1955, 9:30 A.M.

The Court: First order of business?

The Clerk: Civil Case No. 59-54, Joseph A. Siciliano vs. American Pacific Dairy Products, Inc., coming on for trial with companion case Civil No. 68-54, Pacific Enterprises, Inc., vs. American Pacific Dairy Products, Inc.

The Court: Is the plaintiff ready?

Mr. Bohn: Ready, your honor.

The Court: Defendant ready?

Mr. Phelan: Ready, your honor.

The Court: Both sides answer ready. The plaintiff may proceed.

Mr. Bohn: If your honor please, I would like to make a brief statement to the court in connection with the law involved in this case and for the joint benefit of the court and counsel cite a series of cases upon which we are relying. It was hoped that this would be in typewritten form, a memo to be served to counsel and court, but it was not possible over Sunday to have it typed. May I proceed?

The Court: Yes, proceed.

Mr. Bohn: As your honor is aware there was a partnership agreement signed between a corporation and an individual and the basic effect of that agreement is one of the major issues in this trial. It is the theory of the plaintiff that the action is primarily governed by those provisions of the Civil Code of Guam pertaining to partnerships and we cite particularly [2*] Section 2432 of the Civil Code. That section in general provides for the mechanics of an execution of partnership. We have checked that section and other related sections and proofread them against the California Code sections and find they are identical, and therefore we are citing several cases which have arisen in California involving similar facts and therefore similar law. First of all, where a corporation is without authority to form a partnership with another, it may be held liable as a partner to prevent injustice, Merwyn Company vs. Bieber, 184 Cal. 637. We also note that it is a well-

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

supported and settled proposition supported by innumerable cases that the rights and liabilities of joint venturers as between themselves are covered by the same rules which apply to partnerships, and it is therefore immaterial whether the agreement be a co-partnership or a joint venture. As a matter of fact the courts have held where for any reason the partnership is imperfect, they hold the transaction to be a joint venture and apply the same rules as they do in the case of a partnership, Zeibak vs. Nasser, 12 Cal. 2d, 1. We also cite Iver vs. Gawn, 99 Cal. Appellate Division 17. We also cite the various provisions of the New California Digest containing briefs of innumerable cases holding substantially the same. Now in the case of Zeibak vs. Nasser which I have just previously cited, the court found specifically that the section of the Code was equally applicable in the case of joint ventures as in the case of a partnership. For that proposition we also cite [3] the following cases: Cunningham vs. De Mardaigle, 82 Cal. Ap. 2d, 620——

The Court: What is the citation?

Mr. Bohn: Cunningham vs. De Mardaigle, 82 Cal. Ap. 2d, 620. We further cite McIsaak vs. Pozzo, 26 Cal. 2d, 809. Now it is the general theory of these cases and our case today that they are distinguished from a partnership repugnant to corporate theory and therefore it has been held that the corporation may enter into such types of ventures under the joint venture theory. We cite the adidtional case of Bates vs. Coronado Beach Company, 109 Cal. 160. It is therefore our theory as to whether it is really a

moot question that a valid partnership existed under this contract, since even though the court may find the corporation unable to enter into such a contract, that the court will find that the corporation is liable under joint ventures in accordance with these cases. We also believe estoppel applicable to a corporation as well as individuals. In other words, when we have a situation where the president of a corporation signs an agreement ostensibly for the corporation, it is true that the president only has such power as has been given by the bylaws and by the board of directors, nevertheless where he exercises it with apparent consent and acquiesence and particularly where the corporation benefits, that corporation is thereby estopped from denying the existence of a binding agreement. In connection with that theory we cite the following cases: Black vs. [4] Harrison Home Company, 155 Cal. 121.

The Court: What is that citation again?

Mr. Bohn: Black vs. Harrison Home Company, 155 Cal. 121. We also cite for the general proposition that corporations, equally with individuals, are subject to the rule that where with full knowledge of all the facts involved they knowingly accept the benefits of a contract made in their behalf, the acceptance of those benefits themselves constitutes an estoppel to denying a binding contract. To further support that proposition we cite the following cases: Aigeltinger, Inc., vs. Burke, 176 Cal. 121; Gribble vs. Columbus Brewing Company, 100 Cal. 67; Newhall vs. Joseph Levy Bag Company, 19 Cal. Appellate Division 9. We will therefore seek to prove to the

court in this case that the agreements were signed; that they became effective; that the corporation accepted the benefits of the contracts; that either the corporation or its president has received from this venture in excess of the sum of $100,000, which we require that they account for the same. We will also seek to prove that this corporation took control of the affairs of the Dairy Queen of Guam, which was the business which concerned the partnership contract, and took in excess of $26,000 of its funds and invested it in another corporation called Guam Frozen Products, Inc., and that they in effect purchased $17,500 of stock of the corporation and are carrying on their books as an account payable and the difference between that and roughly $26,000 of the funds have [5] been commingled. We will also seek to prove that the present manager of the Dairy Queen of Guam is acting as manager for the competing corporation and that the present manager of the Dairy Queen of Guam, in fact, is intermingling its supplies, its personnel and its funds with the other corporation. We will ask the court, therefore, for the relief prayed for in the complaint.

The Court: Do you have anything to say at this time?

Mr. Phelan: Nothing at all.

The Court: Call your first witness.

Mr. Phelan: May it please the court, may we have the witnesses excluded from the courtroom?

The Court: Do you have any objection?

Mr. Bohn: I have no objection, your Honor.

The Court: In the case of Joseph A. Siciliano,

plaintiff, vs. American Pacific Dairy Products, Inc., by stipulation of the parties, all witnesses who have been subpoenaed to testify in this case or who expect to testify in this case will leave the courtroom and remain out until their testimony has been given except for one witness for the plaintiff and one witness for the defendant.

Mr. Bohn: May I proceed, your Honor to call the first witness.

The Court: Yes.

Mr. Bohn: Mr. Siciliano. [6]

MR. JOSEPH A. SICILIANO

the plaintiff, was called as a witness in his own behalf, was duly sworn and testified as follows:

Direct Examination

By Mr. Bohn:

Q. Would you please give your full name, Mr. Siciliano? A. Joseph A. Siciliano.

Q. And where are you presently residing?

A. Maite, Barrigada.

Q. Do you own your own home there?

A. I do.

Q. And what business are you presently operating in Guam?

A. Talk of the Town restaurant, Pacific Bakery, Pacific Snack Bar. I also have a farm and am part owner of a ship, the Arctic.

Q. Calling your attention to the month of June, 1952, prior to the 20th day of June, 1952, what business were you operating at that time?

A. Pacific Bakery, Talk of the Town, and Pa-

(Testimony of Joseph A. Siciliano.)

cific Snack Bar. Also the starting of the farm at that time and the ship.

Q. Approximately how many employees did you have at that time?

A. Oh, I'd say between 100 and 110.

Q. And did you operate your various businesses through any corporate entity or enterprise? [7]

A. I did.

Q. And what was the name of that corporation?

A. Pacific Enterprises, Inc.

Q. And approximately what is your estimate of the amount of money that you were handling each day for all of your enterprises?

A. I would say approximately $2,000 a day, anywhere from $1,500 to $2,000.

Q. And Mr. Siciliano when did you first meet Mr.—withdraw that question. Do you know Mr. Edward Thompson? A. I do.

Q. And when did you first meet Mr. Thompson?

A. I met him some time back in 1951.

Q. That is the year 1951? A. 1951.

Q. And what was the occasion of that meeting?

A. To talk about the business of selling ice cream in the Dairy Queen.

Q. Did you have any conversations with Mr. Thompson at that time? A. Oh, many.

Q. By "many" how many do you mean?

A. Numerous. We had also correspondence. Somebody introduced us and then when he came out here we had numerous talks about going into business to sell ice cream. [8]

(Testimony of Joseph A. Siciliano.)

Q. And about when in 1951 was this?

A. Well, dates I am very bad—probably in the middle of '51. The records will show.

Q. And you said that you and Mr. Thompson had numerous discussions about getting into business in Guam? A. That is correct.

Q. And as a result of these conversations did Mr. Thompson ever cause you to be appointed managing agent for American Pacific Dairy Products? A. He did.

Q. I show you what purports to be a certificate of adoption of corporate resolution of American Pacific Dairy Products, Inc., which is dated March 19, 1951, and ask you to read this and tell us whether or not this resolution is the one appointing you managing agent for the American Pacific Dairy Products on Guam.

A. You want me to read this?

Q. It isn't necessary to read it out loud. Just identify it. A. This is right.

Mr. Bohn: I now offer this in evidence, if your Honor please, as Plaintiff's Exhibit No. 1.

The Court: Any objection?

Mr. Phelan: None.

The Court: Without objection, it will be [9] received.

Q. (By Mr. Bohn): Now, Mr. Siciliano, you testified that you had numerous conversations with Mr. Thompson. Do you know whether or not subsequent to the date of your being appointed managing agent for this corporation that in fact Mr.

(Testimony of Joseph A. Siciliano.)

Thompson or American Pacific Dairy Products entered into a contract with one Al Slaughter?

Mr. Phelan: If it please the court, I can't see what bearing this has on this case.

The Court: I think what we are trying to do is trace the development of the relationship between the parties leading up to the making of the partnership agreement. Your objection will be overruled.

Q. (By Mr. Bohn): You say there was such an agreement?

A. There was such an agreement, to my surprise. I was still working on locating land and such stuff and all of a sudden I found out from Mr. Slaughter when he come back from the States that he had some kind of an agreement with Mr. Ed Thompson and at that time I felt pretty bad because he was dealing with me previously, and when I heard about this with Slaughter I felt I was being let down, and I was going to go ahead with Jack from Honolulu. He had had an ice cream plant and I was going to put in a similar thing because I was pretty angry at that time. I worked on that part and Mr. Thompson heard of it and Mr. Moylan had the agency for the soft freeze machine and some time after that—before I went into it I guess— [10] it was maybe a month or two months because I was also looking for a location, Mr. Thompson wrote me a few letters and told me he was not satisfied with Mr. Slaughter, he was changing his mind because he was not doing the job the way it was supposed to be. The building that was going up cost

(Testimony of Joseph A. Siciliano.)

too much and at that time I stopped going into the other thing until I heard further from him, which I did later on.

Q. And as a result of this correspondence and these negotiations with Mr. Thompson were you ultimately offered a full 50 per cent participation in the Dairy Queen of Guam?

A. I was because Mr. Thompson knew I wouldn't take it for less than 50 per cent. That was our previous conversations many times before.

Q. Now as the result of you and Mr. Thompson reaching such an agreement did you sign any contract with him or with American Pacific Dairy Products?

A. We signed a contract some time in June.

Q. June of what year? A. '52, 1952.

Q. By this time you had been negotiating with Mr. Thompson over a year, is that correct?

A. Oh, at least a year.

Q. I show you what purports to be Articles of Co-partnership dated June 23, 1952, in which Joseph Siciliano is described as a partner and American Pacific Dairy Products, a corporation, [11] is described as another partner and ask you to glance at the agreement and the signatures and tell us whether this is the contract that was executed?

A. This is it.

Mr. Bohn: If your honor please, I now offer this as Plaintiff's Exhibit next in order.

The Court: Any objection?

(Testimony of Joseph A. Siciliano.)

Mr. Phelan: No objection.

The Court: It will be received as Plaintiff's Exhibit No. 2.

Q. (By Mr. Bohn): Now, Mr. Siciliano, did you also sign a supplementary agreement involving the American Pacific Dairy Products on or about the 23d day of June 1952? A. I did.

Q. I show you what purports to be an agreement dated that date in which various material is repeated, supplementing the partnership agreement, and ask you to glance through the signatures and tell us whether this is the one that was executed?

A. This is the one.

Mr. Bohn: If you honor please, I then offer this agreement dated June 23, 1952, as Plaintiff's Exhibit next in order.

Mr. Phelan: No objection.

The Court: Any objection?

Mr. Phelan: None.

The Court: There being no objection, it will be received [12] as Plaintiff's Exhibit No. 3.

Q. (By Mr. Bohn): Mr. Siciliano, as a part of the same transaction was there assigned to the Dairy Queen of Guam a certain lease of real property upon which the building of the Dairy Queen of Guam rests?

A. That is right, there was.

Q. I will show you what purports to be an assignment of lease of real property which is dated June 23, 1952, and ask you—which purports to be an assignment of a certain lease in Anigua to the

(Testimony of Joseph A. Siciliano.)

Dairy Queen of Guam and ask you to identify this document, if that was the one that was signed and received? A. This is the one.

Q. That was the one that was received?

A. (Nods head.)

Mr. Bohn: I now offer this assignment of lease of real property as Plaintiff's Exhibit next in order.

The Court: Any objection?

Mr. Phelan: No objection.

The Court: Without objection, it will be received.

Q. (By Mr. Bohn): Now, Mr. Siciliano, was there also executed about the 23d day of June a certificate of co-partnership transacting business under fictitious name? A. Yes, that is right.

Q. I will ask you to examine what purports to be such a certificate and ask you if that was the one so signed? [13] A. This is the one.

Mr. Bohn: I now offer what purports to be a certificate of co-partnership transacting business under fictitious name as Plaintiff's Exhibit next in order.

The Court: Any objection?

Mr. Phelan: None.

The Court: It will be received as Plaintiff's Exhibit 5.

Q. (By Mr. Bohn): Mr. Siciliano, was that certificate filed in the appropriate government office according to the laws of Guam?

A. It was by Mr. Lyle Turner.

Q. It was filed? A. Yes.

(Testimony of Joseph A. Siciliano.)

Q. And was there received a certificate dated August 21, 1952, signed by Richard Taitano, Director of Finance, which indicates this was received on August 1st and entered as No. 23 in the records of Guam? Check that and see. A. That is right.

Mr. Bohn: I now offer this as Plaintiff's Exhibit next in order.

The Court: Any objection?

Mr. Phelan: No objection.

The Court: Without objection, it will be received as Plaintiff's Exhibit No. 6.

Q. (By Mr. Bohn): Now to the best of your knowledge, [14] Mr. Siciliano, has that certificate of co-partnership doing business under a fictitious name ever been canceled in the records of Guam?

A. Not that I know of.

Q. You never signed such a cancellation?

A. No.

Q. To the best of your knowledge it continues to transact business under a fictitious name and is composed of a partnership between American Pacific Dairy Products and yourself?

A. That is right.

Q. After these contracts—withdraw that question. Did you pay the sum of $15,000 to Mr. Thompson or American Pacific Dairy Products in accordance with the requirements of that contract?

A. At that time I think I gave him $7,500 and the other $7,500 was left in the bank account which he was to receive later on.

Q. The total was $15,000?

(Testimony of Joseph A. Siciliano.)

A. That is right.

Q. Have you received that $15,000 back?

A. No.

Q. Have you received any money of any kind from the Dairy Queen of Guam? A. No.

Q. You have never received any profits? [15]

A. No profits.

Q. Now after these agreements what did you do?

A. Went right to work and opened up the Dairy Queen. In fact we were working on the opening at that time. I opened it as soon as possible and I worked there for a week or so, broke in the boys, got my best boys down there who knew about ice cream and broke them in on what to do to make and sell ice cream. I got a few pointers from Mr. Thompson before he left and went right to work with them.

Q. You referred to good boys. Are you referring to employees of Pacific Enterprises? A. Yes.

Q. Did you ever operate an ice cream business before? A. Oh, I did.

Q. Where? A. 20th Air Force Base.

Q. Was that on the island of Guam?

A. Yes.

Q. When was that?

A. 1948. We had one of the largest ice cream plants on the island of Guam and I was allowed to sell out of my own snack bar. I had to supply them first.

Q. Had any of these employees you put in the Dairy Queen of Guam any previous experience?

(Testimony of Joseph A. Siciliano.)

A. They had. [16]

Q. They had worked around ice cream?

A. Yes.

Q. And it was for that reason you chose them, is that correct? A. Oh, yes.

Q. Now, did you also, at the same time you were breaking in these boys, did you also have one of your key supervisory employees working with you?

A. Joseph Meggo. M-e-g-g-o.

Q. Now, how many snack bar and restaurant operations have you and Joe Meggo operated on the island of Guam?

A. I operated a large cafeteria which fed 2 to 3,000 people a day and I opened nine snack bars, plus the ice cream plant at Harmon Field.

Mr. Phelan: If it please the court, I can't see what those snack bars have to do with the Dairy Queen of Guam.

The Court: Part of your defense is failure to properly operate the Dairy Queen. I think the purpose of this line of questioning is to establish the competency of operation at the time the snack bar or the ice cream place was opened. Your objection will be overruled.

Q. (By Mr. Bohn): Now, did Mr. Joseph Meggo also act as one of your supervisors when you were running the ice cream plants at Harmon Field?

A. He was supervisor of all the snack bars, also the ice [17] cream plant.

(Testimony of Joseph A. Siciliano.)

Q. Mr. Joseph Meggo worked with you while you were opening up the Dairy Queen, is that correct? A. He did.

Q. And did you then turn over the supervision of Dairy Queen to Mr. Meggo? A. I did.

Q. And did Mr. Meggo in fact supervise the operations of Dairy Queen? A. He did.

Q. And for how long a period was that?

A. Well, up to when Mr. Norman Thompson took over.

Q. And the man that was in charge of the Dairy Queen until Mr. Norman Thompson took over was Mr. Joseph Meggo, is that correct?

A. That is right.

Q. You have already stated that you have not received any funds at all from the operation of the Dairy Queen of Guam. I now ask you this question: Have you ever received an accounting of the operations of the Dairy Queen of Guam since Mr. Norman Thompson took over? A. No.

Q. And for that reason you are not now familiar with the amount of profits or as to what happened to the money, is that correct? [18]

A. That is true.

Mr. Bohn: That will be all of this witness, Mr. Phelan.

Cross-Examination

By Mr. Phelan:

Q. Mr. Siciliano, you entered into this partnership on the 23rd day of June, 1952?

A. That is right.

(Testimony of Joseph A. Siciliano.)

Q. And under the terms of this partnership you were to be the manager of Dairy Queen, is that right?

Mr. Bohn: I object to that, if your Honor please; it calls for a conclusion of the witness and the contract speaks for itself.

The Court: The objection will be overruled.

Q. (By Mr. Phelan): Were you to be the manager?

A. I was to overlook the operation and get it started.

Q. You weren't to be the manager?

A. Well, I don't know what you call it. If you want to call it a manager, I was the manager, but not to be there all the time but to get it in operation.

Q. Did you have any other duties?

A. Many—Talk of the Town——

Q. In connection with Dairy Queen?

A. First of all to get the boys trained, show them how to sell it, keep the books, just the normal operations.

Q. How much time did you spend at the Dairy Queen? [19]

A. When I first got there to open it up I would say I spent at least 14 to 16 hours in the beginning.

Q. For how many days?

A. Eight or nine days.

Q. How much time did you spend at the Dairy Queen after that?

A. After that I left the island of Guam.

(Testimony of Joseph A. Siciliano.)

Q. How long were you gone from Guam?

A. Approximately two years.

Q. During that period did you ever return to the island of Guam? A. I did not.

Q. Now, speaking of your boys—were they employed by you, personally?

A. They were employed by Pacific Enterprises.

Q. Are you and Pacific Enterprises the same?

A. Well, practically. I am a majority stockholder and president of it.

Q. What percentage of the stock do you own in Pacific Enterprises?

A. Around 94 per cent, something like that.

Q. So that for all intents and purposes you and Pacific Enterprises are the same?

A. Practically the same.

Q. You used employees of Pacific [20] Enterprises? A. I had to.

Q. Do you have any employees of your own?

A. They are Pacific Enterprises, which I consider just like my own.

Q. So anyone working for Pacific Enterprises you consider as working for you?

A. Working for me and for Pacific Enterprises.

Q. Now, when did Dairy Queen open?

A. I am not sure of the date; it was around June 22 or June 23, maybe a little before; I am not just sure.

Q. And when did you leave Guam?

A. July 1st or 2nd.

(Testimony of Joseph A. Siciliano.)

Q. And during that period you spent 12 to 16 hours a day at the Dairy Queen?

A. At the Dairy Queen of Guam.

Q. Every day?

A. Every day; never missed a day.

Q. Who else spent time there?

A. Tony Toquero—he was the main one. I had two other boys come, then Freddy—I don't remember all their names, just their nicknames—and Joe Meggo.

Q. How often did he come down there?

A. The main important parts of the day, the mixing time, late at night or early morning or the afternoon to show him what we were doing with the mix, how to keep the records. In [21] other words, the important part of the day he was down there with me so he could learn something.

Q. During how much of that period was he down there?

A. I would say approximately four hours or five hours. He would bring down my lunch and stay two hours then he would come back at night when I was closing. I would say again, four or five hours.

Q. Was anybody else there?

A. My Filipino boys I was breaking in. They were always there.

Q. What hours was the store opened during those days?

A. I think it was 11:30 or noon until closing at

(Testimony of Joseph A. Siciliano.)

12 at night. We had it open by noon to get the kids at school.

Q. How big is the store?

A. 24 by 18, something like that.

Q. How many machines has it got?

A. Two machines.

Q. Now, during that period that you were down there, what did you do personally?

A. What did I do personally?

Q. Yes.

A. Teach the boys how to make the mix, get the cold water in it the right way, prepare the mix, show them how to load the machines without overloading, every little detail like that and to teach the boys how to be clean. That was number one [22] because the medica were on our back.

Q. After the 1st or 2nd of July, what did you do?

A. I just left Mr. Meggo in charge. I only knew a day or two before I was leaving that I was leaving. I got Mr. Meggo down there and told him to run the operation the same as I was running it.

Q. Yet your partnership agreement said you were to be the manager?

Mr. Bohn: I object to that, if the court please, for the same reasons. The partnership agreement speaks for itself. It does not say he was to be manager. He is putting words in his mouth.

Mr. Phelan: I suggest you read the agreement.

Mr. Bohn: I have read it.

The Court: I think the witness has explained all you need to know.

(Testimony of Joseph A. Siciliano.)

Q. (By Mr. Phelan): Did you have any authority to place a manager down there? A. I did.

Q. What authority?

A. Authority of myself because I was running the business on Guam. I was to overlook the business. There was no agreement as I remember that I had to get a report or anything to put somebody down there. It was understood that I could not ever give it my full time, just the operation to see that it was run [23] right.

Q. What other duties did Mr. Meggo have at that time?

A. He had the collection of the money in the snack bar which I was operating, daily, also overlook the bakery. He was more or less in a supervisory capacity. He ordered flour for the bakery, overlooked the boys at the bakery, also at the snack bar and collects the money morning, afternoon and night and does the same thing for Dairy Queen.

Q. He collects the money three times a day?

A. No; he wouldn't put it in the bank but in the petty cash. He would be down there in the morning to put in the petty cash and around 4:00 o'clock at the change of shift he would take the money they had and come back at night before closing.

Q. Did he also handle your banking?

A. No.

Q. Who made your deposits?

A. Mr. Henry Diza or whoever was in charge of the office.

(Testimony of Joseph A. Siciliano.)

Q. Were they made daily?

A. No; Madeline Dorsit was here and she was handling the money. After she left Henry Diza handled the money.

Q. Did he bank daily?

A. No; he did not bank daily because he had no authority to sign checks so he just kept the cash in the safe.

Q. The Dairy Queen cash?

A. The Dairy Queen cash, yes. [24]

Q. Did he ever bank it?

A. You mean in my own organization?

Q. Or the Dairy Queen.

A. I don't think on the Dairy Queen he has; I am not sure.

Q. Did anybody bank it for the Dairy Queen?

A. Yes; Madeline Dorsit and Mrs. Matson who was here at that time to help set up the books. Madeline Dorsit took care of everything until the time she left here because she was the comptroller.

Q. You actually spent eight or nine days at the Dairy Queen?

A. Well, whenever it was open I was there. Previous to that and the day we opened up for business, I was there every day until I left. In fact, I practically had my clothes down there when I left for the plane.

Q. Now, when you left you left the control of Dairy Queen with the employees of Pacific Enterprises? A. That is right.

Q. When did you advise American Pacific Dairy

(Testimony of Joseph A. Siciliano.)

Products, Inc., of the fact that you had turned the control of the store over to this corporation?

A. When I got into the States I called Mr. Thompson and told him of my problems and I told him that the place would be operated all right and not to worry about it.

Q. When did you tell him you were coming [25] back?

A. I told him I would be back in six or eight weeks. I didn't expect to be gone longer than eight weeks.

Q. And you were gone for two years?

A. That is right.

Q. Now, you left this business in the care and custody of another corporation?

Mr. Bohn: I will object to that on the grounds it is argumentative and it has been asked and answered.

The Court: The objection will be sustained.

Q. (By Mr. Phelan): Did you have a contract on behalf of Pacific Enterprises with the Dairy Queen of Guam? A. No.

Q. You just moved their employees in there and they worked there?

A. That is right. I moved them in there with the understanding also that before that Mr. Thompson knew how I had to put them in there because there were no other employees available at the time. You couldn't even get any.

Q. Did you tell Mr. Thompson at that time that

(Testimony of Joseph A. Siciliano.)

they were employees of your corporation or your employees?

A. He knew of my employees. He knew of my corporation. I don't know whether I told him they were employees of Pacific Enterprises but it had to be; it couldn't be any other way.

Q. You didn't tell him they were your [26] employees? A. No, not personally.

Q. Then for a period of approximately a year the employees of Pacific Enterprises handled the cash, ran the business, had full control of everything? A. That is true.

Q. And kept the books? A. Yes.

Q. Have you ever seen the books?

A. Just in the beginning when we started, that is all.

Q. What kind of books were they?

A. Regular books we keep in business. In order to start right, Mrs. Matson, who was with the Treasury Department there, was good enough to come down there and take the inventory and I remember Madeline—she helped her to keep it separate from the Pacific Enterprises. She helped for two or three weeks or more on the set-up of the books.

Q. She worked for about a month setting the books up?

A. She helped, not only Dairy Queen, but she helped get this set up because she worked for a time with Henry to see we kept good records like a CPA.

Q. Was she working for the Government of Guam at that time?

(Testimony of Joseph A. Siciliano.)

A. Yes, she was but she got permission to come down and work for us in the evening.

Q. Did you set up the books as a branch of Pacific Enterprises? [27]

A. Not as a branch because it was a partnership. I never said it was another branch of Pacific Enterprises.

Q. Now, how much time did Mrs. Matson spend on the books of Dairy Queen?

A. Well, the hours I could not tell. If I told it wouldn't be the truth about it but I know she worked on the inventory. I know she worked on the books. The only one who could answer that would be Henry or Madeline Dorsit.

Q. What was in the inventory?

A. Anything that was down there at the Dairy Queen when we started, containers, cups, things like that.

Q. It took her 30 days?

A. Oh, now, she worked on the books in the office for approximately 30 days.

Q. She worked on the books and Madeline Dorsit did? A. No; Henry Diza.

Q. Did Madeline ever work on the books?

A. No, sir; she only handled the cash, turned the cash in.

Mr. Phelan: I have no other questions at this time.

(Testimony of Joseph A. Siciliano.)

Redirect Examination

By Mr. Bohn:

Q. At the time that you first reached the agreement with Mr. Thompson which provided you with 50 per cent interest in this business was American Pacific Dairy Products heavily indebted in [28] Guam?

Mr. Phelan: I object to that because there has been no foundation.

The Court: It certainly is not proper redirect examination.

Mr. Bohn: I withdraw the question, if your Honor please. I will try it another way.

Q. (By Mr. Bohn): Did you perform any services for the Dairy Queen of Guam prior to the date it opened? A. Yes, I did.

Q. And what did those services consist of?

A. Well, to see that everything was checked, see that it was in order, clean up the place. The switch boxes wasn't finished, electrical work, machinery—tried out different things like that. It was mostly in general. Anything that wasn't completed we just finished up with our boys. Mr. Thompson was here at the time we checked the water, getting cold water in for the mix and different things like that so we would have it properly set up.

Q. Did you provide the full facilities of your organization and all of its employees where needed to get the Dairy Queen of Guam open and operating?

(Testimony of Joseph A. Siciliano.)

Mr. Phelan: I object. That is a leading question and I think it is improper. I think counsel is doing the testifying.

The Court: Well, again, the question has been asked and answered—he did. [29]

Mr. Bohn: I have no further questions of this witness.

Recross-Examination

By Mr. Phelan:

Q. Based upon the redirect I would like to ask you one question, Mr. Siciliano. You said you checked the machinery and all that. What did Mr. Thompson do? A. He was there, too.

Q. What did he do?

A. Same thing I was doing, but I had my boys do the work. I just checked what had to be done.

Q. What work did your boys do?

A. Cleaning things.

Q. What did they clean?

A. The store out. Everything had to be cleaned —the reefers, the merchandise—opening the boxes, setting things up, washing out the machinery, checking the machinery.

Q. How long did that take?

A. Oh, we were down there at least two or three weeks before we opened.

Q. Two or three weeks?

A. Yes, sir; because the construction people were not finished. We noticed the roof was leaking and we squawked and they fixed it.

(Testimony of Joseph A. Siciliano.)

Q. The construction company fixed the roof?

A. Yes; we made sure they fixed it. [30]

Q. How much time did you spend down there?

A. Oh, about two or three hours a day to see what work was to be done.

Q. About how many boys worked there?

A. Four or five boys.

Q. How much time did Mr. Thompson spend there? A. About the same.

Q. The same amount of time that you did?

A. No; I met him down there. He was down there sometimes before me. He might have spent a little more time than I did, but he was down there.

Q. Your boys cleaned up the building?

A. Yes.

Q. The debris left after the construction?

A. Well, anything that had to be done. When the electrical mixer was set up and didn't work I would get my electrician down there to work on that—different things like that.

Q. How long did your electrician work?

A. That I don't know.

Q. Were you present when he was working?

A. When he started I was, then I left.

Q. What was he working on?

A. The switch box.

Q. What did you do with the machinery?

A. We had to check it. [31]

Q. Who checked it?

A. Mr. Thompson and myself just to see that it worked right making samples.

(Testimony of Joseph A. Siciliano.)

Q. How long did it take to check it?

A. A few hours.

Q. When did you check it?

A. Before we opened.

Q. How long before you opened?

A. I would say about a week or maybe three or four days. The time element I am not just sure. I know it was before we opened. We made some test runs and things like that.

Mr. Phelan: I have no other questions.

Mr. Bohn: I have no further questions of this witness, your Honor.

Examination

By the Court:

Q. Mr. Siciliano, tell me something about this product. Was this a retail outlet?

A. This was strictly a retail outlet.

Q. Yes—what did it sell?

A. Soft ice cream like a custard in pints and quarts, in cones and sundaes.

Q. All of this business was done at the location?

A. At the location.

Q. Now, was this soft ice cream made from a powdered mix? A. That is right, sir. [32]

Q. What do you add to it?

A. Water and powdered milk and vanilla for flavoring.

Q. And where did the powdered mix come from?

A. From the States. We ordered it from the States the same as we would our ice cream mix.

(Testimony of Joseph A. Siciliano.)

Q. Was it a patented mix?

A. The ice cream powdered mix is a patented mix. That is what I was told by Mr. Thompson.

Q. You always purchased from one supplier?

A. Yes, sir; from Mr. Ed Thompson. He would do the ordering for us on the mix.

Q. Now, from this powdered milk, powdered mix, water and so forth you made soft ice cream?

A. That is right, sir.

Q. What was the nature of the equipment that you used?

A. The equipment was a machine, supposed to be a patented machine. I never seen any one like it. It is continuous and makes a pretty good amount. You just keep adding the milk and water and you can continue using the machine continuously all day long if you have a line of people.

Q. Were those machines purchased or did you have them on a rental basis or what?

A. I can't answer that exactly. I thought they were purchased but because of the patent, I don't know. I know they were supposed to belong to us here on Guam, belonged to the [33] partnership.

Q. Do I understand the American Pacific Dairy Products had the patent?

A. Well, either them or a similar organization that Mr. Ed Thompson is in. They have a patent on that machine.

Q. Then this business consisted of mixing this soft ice cream and dispensing it over the counter?

A. And in quarts and pints because we make it

(Testimony of Joseph A. Siciliano.)

up ahead and we put it in a small deep freeze and freeze it and we can sell it in quarts and pints.

Q. You did no wholesale business?

A. At that time we didn't because we had all we could do to make what we could sell retail. It was pretty hard to keep up with what we sold retail.

Q. What did you have to have from the States besides the ice cream mix—such things as cones and containers?

A. Oh, yes, cones, containers. They were ordered from the Zellerbach Paper Company through Dairy Products in the States. They buy in large quantities and we get a good buy on them. We ordered through the Zellerbach Paper Company and also the cones from one place most of the time, who gives the best buy on cones. Then we buy toppings and syrups.

Q. Did the partnership buy these things directly or did they buy them through the corporation?

A. You mean through my corporation? [34]

Q. No; through the American Pacific Dairy Products.

A. Some of them were bought direct and some weren't. Mr. Ed Thompson knew the set up and he naturally, in the beginning, did the ordering until we got to know who to order from.

Q. It was not contemplated that Mr. Thompson would remain in Guam?

A. Oh, no; he would come in and out.

The Court: No further questions.

Mr. Bohn: No further questions of this witness.

The Court: You may be excused, Mr. Siciliano. The court will take a ten-minute recess at this time.

(The court recessed at 10:40 a.m., February 14, 1955, and reconvened at 10:50 a.m., February 14, 1955.)

The Court: I notice that the pretrial order in this case, this companion case, has not been signed. Has it been examined?

Mr. Phelan: I have read it and there are several typographical errors in it, your Honor. First of all, I do not represent the defendants. I only represent one defendant.

The Court: The pretrial order shows that.

Mr. Phelan: Maybe it is in the other case it shows me representing the defendant and I definitely don't. I remember it.

The Court: If so, it was inadvertent. During the noon recess I wish counsel would examine the order and make any [35] corrections. Yes, you are correct. It is understood, of course, that you only represent the American Pacific Dairy Products. Examine the orders at the noon recess and be prepared to approve or recommend any changes. Call your next witness.

JOSEPH MEGGO

called as a witness by the plaintiff, was duly sworn and testified as follows:

Direct Examination

By Mr. Bohn:

Q. Would you please give us your full name?

A. Joseph Meggo.

Q. Where do you reside, Mr. Meggo?

(Testimony of Joseph Meggo.)

A. At present?

Q. Where do you reside at the present time?

A. Pedro M. Ada. Where I work?

Q. No; where do you reside?

A. At Tamuning.

Q. At the present time? A. Yes, sir.

Q. Now, where are you employed, Mr. Meggo?

A. Pedro M. Ada.

Q. Where?

A. Manager of the store, Food City.

Q. When were you first employed by Mr. Ada?

A. November, 1954. [36]

Q. 1954. And prior to that time who were you employed by? A. Mr. Joseph Siciliano.

Q. Were you employed by Pacific Enterprises Corporation? A. Yes.

Q. What were your duties with Mr. Siciliano and Pacific Enterprises?

A. As manager of Pacific Bakery. I was doing butchering, meat cutting, all by myself and doing all of his buying for his bakery products, running his snack bar and we had a bake shop, retail, at Marbo. I was working over there, too.

Q. When did you first start your employment with Pacific Enterprises or Mr. Siciliano?

A. 1945, March, I came to Guam. I worked at the Harmon Field Restaurant, then I was managing the Marbo snack bar and the ice cream plant at Harmon Field and I worked in there and also at North Field. In 1949 it was North Field and we had three snack bars there and I was operating that.

(Testimony of Joseph Meggo.)

Q. You continued in your employment with Mr. Joseph Siciliano from March of 1949 until November '54?

A. That is correct. In 1949 I went home and I came back in June when we established the Pacific Enterprises in Tamuning.

Q. And you worked continuously for this employer since that time? A. Yes.

Q. Now, calling your attention to the month of June in [37] 1952—did you have occasion to perform any duties or to work at an establishment called the Dairy Queen of Guam? A. I did.

Q. When did you first start performing any services in connection with the Dairy Queen of Guam?

A. When Mr. Thompson and Mr. Siciliano opened up the Dairy Queen I was helping out, bringing supplies down and all that. I worked up odds and ends, back and forth, a few hours a day, helping Joe and when Mr. Thompson left the island I was Joe's right-hand man for the Dairy Queen four or five hours a day. I even brought his lunch to him. He didn't leave it. His heart and soul was in the Dairy Queen and he showed me the way Mr. Thompson showed Mr. Siciliano and Mr. Siciliano was teaching me the way Mr. Thompson taught Mr. Siciliano.

Q. And you were familiar with the requirements from operating the ice cream plant at Harmon?

A. I was.

(Testimony of Joseph Meggo.)

Q. You know about bacteria count and so forth?

A. I did.

Q. And you knew how to store ice cream and dispense it? A. I did.

Q. Now, after Mr. Siciliano left Guam, what service did you continue for the Dairy Queen?

A. He put me in charge of the Dairy Queen and I followed on exactly how he showed me. [38]

Q. How long did that continue with you as manager of Dairy Queen?

A. Well, until Mr. Thompson, Jr., arrived in Guam.

Q. About when was that, do you remember?

A. I can't recall because I was responsible for Pacific Enterprises, too.

Q. You were continuously the manager until Mr. Norman Thompson took over, is that correct?

A. That is right.

Q. How many days a week did you perform services for the Dairy Queen?

A. Seven days a week.

Q. Is that true throughout the entire period?

A. Every day I was at the Dairy Queen.

Q. What did you do in the morning?

A. I stayed there for an hour or two, took the money to them—the bank—I had other duties—the Talk of the Town and snack bar. I brought chow to them from the Talk of the Town. I stayed until each boy had their chow. I stayed there until school was going then I went back to Pacific Enterprises then 4:00 or 4:30 I changed their bank. I changed

(Testimony of Joseph Meggo.)

their bank each shift, then about 7:00 or 8:00 o'clock at night, if I knew it was going to be busy at a certain time, I went down and gave the boys a hand. I had the two machines working and I took care of the customers as they came to the window. [39]

Q. So approximately how many hours a day did you put in physically at the Dairy Queen establishment?

A. Four or five hours, maybe six sometimes. It all depends—sometimes we had to close late because of so many customers.

Q. Did you physically transport the employees from their place of residence to the place of employment? A. I did.

Q. That was in the morning? A. Yes.

Q. How about the change of shift in the afternoon? A. I did.

Q. You took the new shift down there from their residence?

A. Yes, and took the old shift back.

Q. Did you bring lunch to both shifts?

A. Just one shift. We brought it down for the last shift from the Talk of the Town.

Q. It was a general rule that food was brought from the Talk of the Town but for one shift you didn't? Did you know any of the employees—you referred to them as boys—did you know any of the employees of Dairy Queen of Guam before the Dairy Queen of Guam opened? A. I did.

Q. Did you know them all? A. All. [40]

Q. How did you happen to know them?

(Testimony of Joseph Meggo.)

A. They worked for Pacific Enterprises before Dairy Queen opened and two boys worked in the ice cream plant.

Q. At Harmon Field? A. Yes.

Q. The other two boys—had they also worked for Pacific Enterprises? A. Yes.

Q. And to your knowledge, are any of those boys still working at the Dairy Queen?

A. They are.

Q. How many of them? A. Two.

Q. In other words, two of the original employees that you and Mr. Siciliano started at the Dairy Queen are still working there, is that correct?

A. Yes.

Q. Now, were there any break-downs or machinery or equipment at the Dairy Queen during the period you supervised its operation?

A. There were.

Q. How frequently did they occur?

A. Usually the knives were not too sharp. We had to either get them replaced or get them sharpened. We sent cables to Mr. Thompson to send us knives and he did, but we did the best [41] we could to keep the Dairy Queen in operation without closing.

Q. When the break-downs occurred, what did you do?

A. We had a maintenance man of our own and we would call him to come down and see what he could do with it.

Q. You mean Pacific Enterprises?

(Testimony of Joseph Meggo.)

A. Yes.

Q. Pacific Enterprises maintained a full crew, is that right? A. That is right.

Q. And when there was a need for maintenance or repair you used the Pacific Enterprise crew?

A. We did.

Q. Did you have occasion to use an electrician?

A. We did.

Q. Carpenters? A. Yes.

Q. Did you have occasion to use any refrigeration mechanics? A. We did.

Q. Did you have occasion to use any other type of personnel from Pacific Enterprises?

A. No—my own.

Q. Your own time? A. Yes.

Q. During this period of time did you construct any [42] additions to the original Pacific Enterprises building? A. At the Dairy Queen?

Q. I beg your pardon. I misspoke myself. Did you construct any additions to the original Dairy Queen building during this period of time?

A. We did.

Q. What did those additions consist of?

A. We put on an extension, a wing on, and we also build a new cesspool. The Pacific Enterprises boys did it themselves.

Q. That was done with your own crew?

A. Our own crew.

Q. Now, Mr. Meggo, how did you handle the money that was coming in daily from the Dairy Queen? A. Well, is that after——

(Testimony of Joseph Meggo.)

Q. When you first started handling it.

A. After Mr. Siciliano left the island?

Q. That is correct.

A. I would go down there, get the money and bank it for the two shifts. When they changed I counted the money right there and at that time the register was working. I took the reading and I had to count the money right there and I took it back and give it to Mr. Diza in the Pacific Enterprises office.

Q. Mr. Diza was the bookkeeper or accountant?

A. The bookkeeper.

Q. By giving them the bank you mean giving them petty [43] cash for purposes of change?

A. That is right.

Q. When you went down there in the morning you would bring the two employees and always give them their petty cash and they had to account for it, is that correct? A. That is right.

Q. Now, when the shift changed in the afternoon, did you mean that you set up another petty cash fund for the new employees?

A. For the new employees.

Q. And you took all the money from the employees whom you had set up the bank for or petty cash fund in the morning, is that correct?

A. That is right.

Q. What time did the Dairy Queen close, by the way? A. 11:00 o'clock.

Q. At nighttime, when it was time to close, you would then get the money from the last shift and

(Testimony of Joseph Meggo.)

you would take that money also to the office of Pacific Enterprises where it was placed in the safe, is that correct? A. That is right.

Q. Now, did you take daily readings of the cash register?

A. We couldn't take them because the register wasn't in working order, but the early part of '53 we had another register put in there and we started taking readings. [44]

Q. But the cash was counted throughout this early period of time? A. Yes.

Q. During the period of your supervision was the Dairy Queen ever closed down for a full day?

A. Yea.

Q. Did it happen more than once?

A. Twice.

Q. Can you tell us the reason on each occasion?

A. Lack of material, merchandise, mix and so forth.

Q. Lack of mix? A. Mix.

Q. Where did you order—withdraw that question. Did you order all the supplies for Dairy Queen?

A. I put the order in the office to have Mr. Henry Diza—exactly what I wanted and he got in contact with Mr. Thompson.

Q. And the supplies were then sent from the States? A. By Mr. Thompson.

Q. Where were the supplies warehoused?

A. In Pacific Enterprises.

(Testimony of Joseph Meggo.)

Q. Were they kept in a segregated area of Pacific Enterprises?

A. They were kept in the same warehouse that we keep Pacific Enterprises merchandise. [45]

Q. Were they segregated?

A. They were segregated.

Q. Did you keep daily inventories?

A. Daily inventories.

Q. Did you require a person to sign for the merchandise to Dairy Queen? A. We did.

Q. Did you turn all those records into the office to Mr. Diza? A. To Mr. Diza.

Q. Who was responsible, Mr. Meggo, for picking up merchandise at the dock and transporting it to the Dairy Queen? A. I was.

Q. And did you frequently do that?

A. Every day.

Q. What equipment did you use to pick up the merchandise?

A. Pacific Enterprises equipment, truck, reefer truck.

Q. Was there also a reefer truck which was kept full time or most of the time at the Dairy Queen?

A. There was.

Q. What was that used for?

A. Supply. We were doing such a tremendous business we couldn't keep quarts and pints so we would put them in the reefer truck to hold in case we got a rush. We had such a small unit in the Dairy Queen we couldn't hold all the supplies. [46] We had to use the reefer truck for an emergency

(Testimony of Joseph Meggo.)

setup so we would have enough to supply the people.

Q. And that reefer truck was a Pacific Enterprises truck, is that correct?

A. Pacific Enterprises truck.

Q. That you used during this period. Did you ever order on behalf of Dairy Queen any merchandise from Pacific Enterprises?

A. From Pacific Enterprises?

Q. Yes; in other words, did Pacific Enterprises ever furnish merchandise to the Dairy Queen?

A. Yea; just a few items—chocolate, frozen strawberries—whenever Dairy Queen ran out of them I had to use Pacific Enterprises so when the order came in for Dairy Queen I just replaced what I took from Pacific Enterprises.

Q. And complete records were kept on all these transactions, is that correct?

A. That is correct.

Mr. Bohn: I have no further questions at this time.

Cross-Examination

By Mr. Phelan:

Q. Mr. Meggo, when was the first time you went down to the Dairy Queen?

A. Well, the first day it was opened.

Q. That was the first time you were down there?

A. Yea. [47]

Q. How long were you down there that day?

A. About 15 or 20 minutes a day at that time.

(Testimony of Joseph Meggo.)

Q. When was the next time you were down there? A. Oh, maybe two days later.

Q. How long were you down there that day?

A. Well, see, at that time Mr. Siciliano was down there himself. There was no use of me staying down there because I had work for Pacific Enterprises.

Q. When was the next time you were down there?

A. Well, after Mr. Thompson left the island I was down there almost every day.

Q. What hours was the store open?

A. About 10:00 o'clock in the morning, between 10:00 and 11:00. That was when Mr. Thompson was there. That was when the business started.

Q. And what time did the shifts change?

A. 4:30.

Q. The men went to work at about 10:00?

A. Yea. Oh, earlier. I don't know—I think a little earlier to get the mix all prepared for opening time. It takes about an hour or so before we could open up to get the mix through the machine and all.

Q. And you took the men to work?

A. Oh, yes. When Mr. Siciliano was opening he took the men down himself. There was no need for me to come down. [48]

Q. How long was he opening?

A. Until he left.

Q. When did he leave? A. I can't recall.

Q. Approximately how long was he gone?

A. Two years.

(Testimony of Joseph Meggo.)

Q. Now, during that two-year period you acted as manager? A. After Joe left, yea.

Q. What instructions did he give you when he left?

A. Just take over as he left and I should follow in his footsteps.

Q. Now, you said you took daily readings from the cash register?

A. Yea, daily before the cash register broke and the tape wouldn't work so we just had to count the money.

Q. When did the cash register break?

A. I can't remember.

Q. For how long a period was it broken?

A. I can't remember.

Q. Were tapes taken from this register until it broke?

A. No; that broke when Mr. Siciliano was here.

Q. When you replaced it with another machine, were tapes taken from that?

A. Yes; the early part of '53.

Q. Who took those tapes? [49]

A. I did.

Q. What did you do with them?

A. Put them in the Pacific Enterprises office.

Q. Who did you give them to?

A. Henry Diza.

Q. What were your other duties with Pacific Enterprises?

A. I was manager of Pacific Bakery and the snack bar. I was running the snack bar, too, and

(Testimony of Joseph Meggo.)

ordering all the supplies for Talk of the Town and doing all the buying for Pacific Enterprises.

Q. Were you managing the bakery?

A. I was managing the bakery.

Q. Now, how much time did you spend at the Snack Bar?

A. Well, we had four good capable boys at the snack bar. Their background was good.

Q. How much time did you spend there?

A. An hour.

Q. How many shifts did you have there?

A. Two shifts.

Q. What time did you open up?

A. 9:00 o'clock in the morning.

Q. What time did you close?

A. That was before we put the new building up. We closed at 12:00.

Q. When did you put the new building up? [50]

The Court: I think counsel should confine himself to the Dairy Queen.

Mr. Phelan: I am trying to find out the extent of those duties. He said he had other duties than the Dairy Queen.

The Court: I don't think it is material except as to the time he spent at the Dairy Queen.

Mr. Phelan: We might find out how much time he spent at Dairy Queen, too.

The Court: Yes, but the direct examination was limited to the time he spent at the Dairy Queen. I think cross-examination should deal with that.

(Testimony of Joseph Meggo.)

Q. (By Mr. Phelan): Now, who kept the books at the Dairy Queen when you were running it?

A. Mr. Henry Diza.

Q. During the entire period?

A. During the entire period.

Q. Did you ever see the books? A. No, sir.

Q. Who handled the bank deposits of Dairy Queen? A. Mr. Henry Diza.

Q. Mr. Diza made the deposits. Do you know how often he did? A. (Shakes head.)

Q. Did you make any cash disbursements from the Dairy Queen? [51] A. No.

Q. Do you know of any cash disbursements during that period? A. No.

Q. You also took all the cash to Mr. Diza?

A. To Mr. Diza.

Q. No money was paid out down at the store?

A. No.

Q. Now, how many days during that period was the store closed? A. What period?

Q. During the period you were running it.

A. The only loss of time was on the supplies.

Q. Well, how many days? A. A week.

Q. One week? A. (Nods head.)

Q. What supplies did you take down there?

A. At the Dairy Queen?

Q. Yes; how frequently did you take supplies down there? A. Every day.

Q. What type were they?

A. Mix, extract, vanilla, stuff like that, cones, pints and quarts containers.

(Testimony of Joseph Meggo.)

Q. Now, how often did you haul supplies from the dock? [52]

A. Oh, every time we had merchandise come in on a ship.

Q. Didn't you, in answer to a question on direct examination, say you hauled supplies from the dock daily? A. No, I did not.

Q. Now, where, when you hauled supplies, were they kept?

A. Pacific Enterprises warehouse.

Q. In their warehouse? A. (Nods head.)

Q. And I believe you said they were segregated?

A. They were.

Q. How were they segregated?

A. In one section of the warehouse all belonged to Dairy Queen.

Q. Were they screened off?

A. No, sir; we kept the doors locked.

Q. Could anybody draw them out?

A. I drew them out myself.

Q. When you got the supplies from the dock and put them in the warehouse did you maintain a separate stock record card for Dairy Queen?

A. Separate cards.

Q. What type of cards?

A. Stock record cards. Every day when we draw the supplies we deduct it from the cards.

Q. Do you know where those cards are? [53]

A. We had them there.

Q. When supplies were issued to Dairy Queen, who signed for them?

(Testimony of Joseph Meggo.)

A. The boy who was in charge.

Q. You took the supplies down? A. I did.

Q. Who signed when they went out of the warehouse?

A. I issued a slip to the truck driver who takes it down and it had to be signed and brought back.

Q. Did you make any reports on the operation of Dairy Queen? A. No.

Q. You never made any reports?

A. (Shakes head.)

Q. During the two-year period or that part of it when you were running Dairy Queen did you ever make any reports to Mr. Siciliano?

A. Yea; I did.

Q. How frequently?

A. Twice; two times.

Q. In what form were those reports?

A. Well, in fact, he called me from the States.

Q. On the telephone?

A. On the telephone.

Q. Did you submit monthly reports to him? [54]

A. I can't answer that. That is office work.

Q. Did you, yourself? A. I didn't.

Q. Did you submit any reports to Mr. Thompson or his corporation, the American Pacific Dairy Products? A. No; I didn't.

Q. Were monthly inventories taken?

A. Yea; every month.

Q. Who took them? A. I did.

Q. What was the inventory date?

A. The last of the month.

(Testimony of Joseph Meggo.)

Q. The last day of the month?

A. Every month.

Q. Were daily inventories taken?

A. Every day.

Q. Who took those?

A. That was on the stock cards. I always rechecked myself back.

Q. You took them daily?

A. I even marked the stock cards myself.

Q. Were inventories taken down at the store?

A. Yea; once a month.

Q. Who took those?

A. Myself and the boys. [55]

Q. What did you do with those inventories?

A. Turned them into Pacific Enterprises office to Mr. Henry Diza.

Q. You didn't do the banking for the business?

A. No, sir.

Q. What was the daily bank that you took down there or change bank?

A. $100 petty cash. Certain days it was $200 or more petty cash; change in silver.

Q. Now, did you keep or cause to be kept daily records of sales? A. Yea.

Q. Was that the gross amount——

A. Of each shift.

Q. Or was it broken down by type of merchandise?

A. No; just the cash coming in to Pacific Enterprises on each shift. It was a separate account. It was two banks.

(Testimony of Joseph Meggo.)

Q. Did you keep any record of whether you sold ice cream cones or sundaes?

A. Oh, yes; we had a break-down of how many pints and quarts were sold and the 15c and 25c sundaes.

Q. That was kept daily?

A. That is kept daily.

Q. Who kept those records?

A. The boys. Whenever we needed anything from back in [56] the hot locker we would take a hundred more cones and bring them out and mark them down and if that was sold we bring another hundred.

Q. Was a record made for the cash received for those cones?

A. Inventory sheets for every day were turned into the office.

Q. With respect to the meals, what shift had to have meals? A. I can't follow you.

Q. What shift down at the Dairy Queen had to have meals? A. The morning shift.

Q. Where did they eat?

A. I brought the food to them from the Talk of the Town.

Q. What time of the day would you bring that to them? A. 1:00 o'clock.

Q. Now, you turned in all of your records to Mr. Diza? A. I did.

Q. And you, yourself, made no reports to American Pacific Dairy Products? A. No.

(Testimony of Joseph Meggo.)

Q. And two reports, verbal reports, over the telephone to Mr. Siciliano? A. Yes.

Q. Did you keep any notes on the business down there, personal notes?

A. No personal notes. [57]

Q. I believe you said that before Mr. Siciliano left he taught you what he knew about the equipment down there? I believe you also said he taught you what Mr. Thompson taught him?

A. That is right.

Q. In other words, did Mr. Thompson show him how to operate the equipment?

A. The machinery, yea.

Q. What maintenance did you have to have done on the machinery?

A. In the freeze unit the drive shaft broke and we had to make do with a ladle until we could get the new parts from Mr. Thompson. We had a temporary hook-up to keep the machine working. We had two machines.

Q. How often did the machines break?

A. I can't recall the number of times but three or four times. There was a lack of gas in the freezer and the drive chain—we replaced that.

Q. How often would the blades break?

A. Oh, they just wear down; they wouldn't break. If they were too sharp even, we had to get replacements.

Q. How many times did you have repairs made on the building?

A. Well, the building—like we had to fix the

(Testimony of Joseph Meggo.)

roof, outside the door, the surrounding area—we had to clean that all out. The medics were worried about that. It wasn't sanitary. [58] We had to keep that spick and span all the time.

Q. Did you build an addition to the building?

A. An extension or wing.

Q. What did you build that out of?

A. Pacific Enterprise material.

Q. What did you build it for?

A. Well, the Dairy Queen was getting so big we figured on putting all flavors out and two more machines in there.

Q. Who made that decision?

A. Well, it was Mr. Siciliano.

Q. When did he make it?

A. Before he left.

Q. Before he left he gave you instructions to build on an addition? A. An addition.

Q. When was that addition built?

A. I don't remember. Just before he left—'52—the early part. Early part of '52 we started.

Q. Did you ever report that addition to Mr. Thompson? A. Not I.

Q. Was that addition started before Mr. Thompson left? A. After.

Q. Was it started before Mr. Siciliano left?

A. The plans were made—rough sketches—the way he wanted it built according to the same as the Dairy Queen, the [59] same as in the front of it.

Q. But it was in back?

(Testimony of Joseph Meggo.)

A. No; on the side.

Q. You said you never saw the records of the Dairy Queen? A. Yes, sir.

Q. Mr. Diza handled that all the time?

A. All the time.

Q. Did Mr. Siciliano give any instructions in writing before he left?

A. He only told me to take over.

Q. Did anyone else have any authority down there during that period? A. No.

Q. Mr. Wallace Viet didn't? A. No, sir.

Q. Did Mr. Diza have any authority?

A. Well, he made himself the general manager. He was over me; he just stepped in.

Q. Mr. Diza did? A. No, Wally Viet.

Q. And he was vice president? A. Yes.

Q. Did Mr. Diza have any authority down at Dairy Queen?

A. I sent Mr. Diza down a few times because I couldn't make it. He took my place to change the bank. [60]

Q. Diza was an officer of Pacific Enterprises?

A. Vice president.

Q. Did you have an office? A. No.

Q. Were you manager of Pacific Enterprises?

A. Partly.

Q. He had authority over you?

A. As vice president.

Q. Did he give you instructions?

A. No, he didn't give me any instructions.

Q. Did he work down there?

(Testimony of Joseph Meggo.)

A. A few hours.

Q. When?

A. Sometimes when I can't make the Dairy Queen myself, I sent him down there.

Mr. Phelan: I have no further questions.

Mr. Bohn: I have no further questions of this witness.

Examination

By the Court:

Q. Now, Mr. Meggo, as I understand it, after Mr. Siciliano left you provided general supervision. You took the employees to work and at the conclusion of their shifts you brought them back?

A. Yes, sir.

Q. You checked the cash at least once a day and turned over the cash to Mr. Diza? [61]

A. I did.

Q. Whom did you advise as to supplies?

A. You mean when I ordered? When they ordered?

Q. Yes.

A. Well, I checked that myself and what merchandise I needed. I went back to Pacific Enterprises and supplied it for them.

Q. How were they ordered?

A. So many drums of mix——

Q. I mean the orders were sent where? To the suppliers?

A. Yea—no; they were sent to me.

Q. You prepared the orders? You prepared the

(Testimony of Joseph Meggo.)

requisitions for supplies? A. Yes.

Q. Did you send them in to the suppliers?

A. No; I give them to Mr. Henry Diza and he sent them to Mr. Thompson.

Q. In other words, Mr. Diza acted as intermediary to order supplies and pay the bills when they came in? A. That is right.

Q. Were they ordered on behalf of Dairy Queen or Pacific Enterprises? A. Dairy Queen.

Q. But you have no knowledge as to how the cash was handled? [62] A. That is right.

Q. Now, am I correct in the assumption that the Dairy Queen owned nothing except the building and equipment and the supplies, that it had no truck or other motorized equipment?

A. That is right; it didn't have any.

Q. It had no facilities to bring supplies from the dock? A. No.

Q. It had no warehousing facilities?

A. No, sir.

Q. All it had was this retail outlet?

A. That is right.

Q. And it depended upon Mr. Siciliano or Pacific Enterprises for everything else to make it an operating concern? A. That is right.

The Court: Questions, gentlemen?

Mr. Bohn: I have no further questions of this witness.

The Court: You may be excused.

Mr. Bohn: I would like at this time, if it please the court, to call Mr. Edward Thompson as an ad-

verse witness, president of American Pacific Dairy Products.

The Court: Permission granted.

MR. EDWARD THOMPSON

called as an adverse witness by the plaintiff, was duly sworn and testified as follows: [63]

Direct Examination

By Mr. Bohn:

Q. Would you give your full name, please, Mr. Thompson? A. Edward Thompson.

Q. And where do you reside, Mr. Thompson?

A. Seattle, Washington.

Q. What address?

A. I have been living at 1113-18th Avenue, Seattle, for the past eight years. Of course, I am in Guam at the present time.

Q. We understand that. Now, are you president of American Pacific Dairy Products, a corporation?

A. Yes, sir.

Q. And who are the other officers?

A. George A. Henrye is the vice president and Herbert S. Little is secretary-treasurer.

Q. Who are the largest stockholders of American Pacific Dairy Products, Inc.?

A. I think I am probably the largest and others would be George Henrye and Dan A. Kimball. I guess those two would be the next largest.

Q. What is the per cent of your ownership in this corporation? A. Not over 15.

Q. Is it less than 15? [64]

(Testimony of Edward Thompson.)

A. I think it is around 12½ but it may be 15.

Q. That is your ownership?

A. That is right, including what my wife has in her name.

Q. You and your wife own less than 15 per cent?

A. That is right.

Q. What would you say Henrye owns?

A. Around 12½ per cent, quoting from memory. It's pretty accurate.

Q. About the same as you ?

A. A little less, about 12 and mine is about 14.

Q. How much does Mr. Kimball own?

A. He owns a little more than Henrye. He owns about 13½.

Q. That is Dan A. Kimball, former under-Secretary of the Navy? A. Yes.

Q. The three largest stockholders have stock that totals roughly 40 per cent. Who owns the other 60 per cent?

A. A number of people—a doctor in Portland whose name escapes me, Tory Webb in Los Angeles, vice president of a taxi company, another stockholder in Los Angeles whose name escapes me now. These people I do not know personally. There is a man who runs a fleet of trucks in Seattle, Robert Whiting; Archie Taft, who runs a radio station in Seattle; a man by the name of Hutchins, president of Western Advertising Agency; George Shaeffer, who is president of the Seattle Tent and Awning Company, and [65] there may be one or two who have some more amounts.

(Testimony of Edward Thompson.)

Q. When was the American Pacific Dairy Products incorporated?

A. I think it was incorporated in August, 1951, or September, '50.

Q. And what was the capitalization?

A. Authorized—$50,000.

Q. How much was actually paid in?

A. The articles of incorporation provided that we could start business when $500 was paid in, but we actually had $42,500 or very close to that amount.

Q. So it was around $42,000 shortly after you were incorporated?

A. Not shortly after, no. I would say within a year and a half afterwards. By the time we opened the store we had $43,600.

Q. By the time you opened the Dairy Queen of Guam you had $42,000, is that correct?

A. Or $43,000, yes.

Q. What was the purpose for the organization of the American Pacific Dairy Products?

A. To open up the Dairy Queen stores on Guam.

Q. That was the sole purpose?

A. I think so. We intended to come over here and open up stores. [66]

Q. Have you at any time been secretary-treasurer of Mix Company, Inc., a corporation, with offices in Olympia, Washington? A. Yes, sir.

Q. Do you still hold that position?

A. I resigned last year.

Q. What was the date of your resignation?

(Testimony of Edward Thompson.)

A. March 1, 1954.

Q. Mix Company, Inc.—what line of business are they in?

A. We manufacture mixes, ice cream and ice milk mixes which are wholesaled to retail stores in Oregon and Washington.

Q. Did Mix Company ever furnish any mix to the Dairy Queen of Guam?

A. When we first started, yes.

Q. And that purchase was made by you?

A. Yes, sir.

Q. At the time you were secretary-treasurer of that corporation and president of American Pacific Dairy Products? A. Yes, sir.

Q. How long did those purchases continue?

A. I think we sent two or maybe three shipments and got a better price from Consolidated so I switched over to Consolidated.

Q. Has Mix Company any connection with Consolidated? A. Not at all. [67]

Q. Is the reverse true that Consolidated has a connection with Mix Company, Inc.?

A. At times in the past Consolidated has sold raw milk to Mix Company. They are not selling it now but they have in the past.

Q. Do you have or hold any interest in Consolidated? A. No, sir.

Q. Do you have any stock in Consolidated?

A. No, sir.

Q. What is your connection with Thompson's Freeze, Inc.?

(Testimony of Edward Thompson.)

A. Well, I was the organizer of it and it was owned by the Thompson family. My brother and I and his children had some stock also, but at the present time I have no interest. I sold out all my stock.

Q. When did you sell out all your stock in Thompson's Freeze, Inc.?

A. I would have to guess. It was some time in the fall of '53, I think.

Q. So up to some time in the fall of '53 you had stock in Thompson's Freeze, Inc., as well?

A. Yes, sir.

Q. Prior to the time the Dairy Queen of Guam opened did you ever furnish to the Government of Guam a statement as to what you thought the monthly business would be?

A. I did not, no. [68]

Q. Was such a statement furnished?

A. I don't know.

Q. I am going to show you what purports to be a copy of a communication directed to the Honorable Carlton Skinner, Governor of Guam. At the end it is closed by saying "Respectfully submitted, American Pacific Dairy Products, Inc., by Edward Thompson, president," but it is not signed. I am going to show you that and ask you if you did in fact sign such a document?

A. I did. We submitted it to the Department of Commerce. I had forgotten. It was some time ago but I did sign that.

Q. I will show it to you as soon as your counsel

(Testimony of Edward Thompson.)

has had an opportunity to check it. I am going to ask you to examine this copy, Mr. Thompson, and state if to the best of your recollection that is a copy of what you signed and furnished the Government of Guam?

A. That's it, yes, I would say.

Q. Now, calling your attention, Mr. Thompson, to—withdraw that question. Do you know about when this was submitted? Apparently it doesn't have a date?

A. Yes; it was submitted about the first week of February, within the first ten days of February, 1951.

Q. 1951? A. Yes, sir.

Q. I call your attention to paragraph N, which reads [69] as follows: "The amount needed to activate the business from the date the application is approved is rather difficult to estimate but in Seattle the building would cost around $10,000 and equipment around $9,000." Was that your statement at that time as to about what the situation would be?

A. That was what it actually cost us in Seattle. We have had eleven stores in Seattle.

Q. What did this building actually cost you in Guam? A. Counting extras, say $15,000.

Q. How much did the equipment cost you?

A. I wouldn't say but I think about 12 or $13,000. I am guessing at that. I know what the building was.

Q. Let me ask you a question a little differently. As of the time that the Dairy Queen of Guam

(Testimony of Edward Thompson.)

opened what was your total investment in the Dairy Queen of Guam at that time?

A. At the time the Dairy Queen of Guam opened on June 22, 1952, it was approximately $42,500, give or take a few dollars.

Q. That was regardless of any amount contributed by Mr. Siciliano?

A. That is right, yes.

Q. Now, that also was the total amount of your capital, wasn't it?

A. No; we had a thousand or so dollars in the bank.

Q. And that is all you had left? [70]

A. We had $550 stock that had not been paid for.

Q. Was the corporation indebted to the extent of about $8,000 in Guam?

A. That is right, sir.

Q. And the debt was unpaid?

A. It had not been paid but it was not delinquent.

Q. And there was no capital in the corporation to pay the debt?

A. Oh, we called on the stockholders whenever we needed money. We could have gotten the money if that is what you mean.

Q. Did you have any cash in the corporation to pay that debt?

A. We had borrowing ability; we had stockholders.

Q. But you had no cash? A. No, sir.

Q. I was just checking something in that report

(Testimony of Edward Thompson.)

but I will ask a few other questions while he is finding it. At the time you made the arrangement with Mr. Siciliano did American Pacific Dairy Products have any employees in Guam?

A. They were Albert Slaughter. He was the manager and we had some Guamanians who Slaughter had hired.

Q. And how long was Albert Slaughter employed by American Pacific Dairy Products?

A. From July or August of 1951, until Siciliano came in about the 21st of June, 1952—not quite a year. [71]

Q. Was he paid a salary? A. Yes, sir.

Q. How much was his salary?

A. $150 a month. He was to get more when we got going.

Q. How many Guamanians did you employ?

A. About four or five. I have forgotten.

Q. How long were they on the payroll?

A. They were on the payroll from about the 15th or 17th of June, 1952, until I made the deal with Joe Siciliano and then we had Joe Siciliano's Filipinos.

Q. How much did you pay these Guamanians?

A. 75c an hour in some cases; 90c an hour in others.

Q. What services did they perform?

A. When I came here Slaughter hired them and a day or two after they cleaned up the store, opened the boxes, distributed the stock we were going to

(Testimony of Edward Thompson.)

use the opening day. They washed the windows and things like that, getting ready to open.

Q. And as of that time you planned to open the store with Guamanians? A. We did, yes.

Q. What date was that?

A. In June after I got here, 1952. June 21st we let them go.

Q. Did you have an agreement with Mr. Slaughter?

A. Mr. Slaughter told us he was going to Ethiopia and [72] would have to quit. We paid him up to the end of the month—I am not sure about that.

Q. So you say the day Siciliano came in was about the 20th of June?

A. I'd say it was about the 21st.

Q. Now I am going back, with the permission of the court, slightly out of order because I have found the other question that I wished to ask you in this application. I want to call your attention to Paragraph D of the application which reads as follows: "It is rather difficult to estimate the volume of business per year. Our stores in Seattle do about 8 or $10,000 a month during the summer months but drop off around $2,000 a month in the winter months. Our fondest hope is that we will not lose as much as the total of the fixed charges. With a better climate we should maintain the same rate throughout the year." That was your estimate at that time?

A. That was our estimate at that time, yes.

Mr. Bohn: I now offer this in evidence, if your

(Testimony of Edward Thompson.)

Honor please, as Plaintiff's Exhibit next in order.

Mr. Phelan: I fail to see what relevancy it has to the case at all.

Mr. Bohn: It is in part preliminary in connection with some of these other matters and partly it sets forth the financial situation of the company at that time, their general plans and their estimates, all of which I think are pertinent. [73]

The Court: Everything that you have talked about has been admitted.

Mr. Bohn: That is correct.

The Court: I find it a bit difficult to understand the relevancy of a document which, according to this witness, was prepared in 1951, in the spring of '51 and the conditions which may have existed in June of 1952.

Mr. Bohn: As I indicated to the court, part of the information was background.

The Court: It shows, of course, Mr. Thompson's best estimate was that stores in Guam or a store would average approximately $2,000 a month, that is make a profit of approximately $2,000 a month.

Mr. Bohn: I withdraw my requests, your Honor.

The Court: Isn't there a gross mentioned there of $10,000?

Mr. Bohn: Between 8 to $10,000 during the summer months.

The Court: Well, I don't think the document itself has any value except as you have brought out the facts by this witness.

Mr. Bohn: I withdraw my offer.

(Testimony of Edward Thompson.)

The Court: Very well.

Q. (By Mr. Bohn): Mr. Thompson, are you a certified public accountant? A. Yes, sir. [74]

Q. By training? A. Yes, sir.

Q. Have you examined these books and records of the Dairy Queen?

A. The old ones I have looked at them, yes.

Q. I am going to ask you to find in those records, whatever records you have to find to be able to answer questions as to how much money you have received personally or American Pacific Dairy Products from the operation of this business. Could you find such records?

A. The money I received personally or American Pacific Dairy Products?

Q. With reference to both.

A. Well, I can find it. I know the answer to that.

Q. Isn't it a fact that you received the following checks signed by yourself from the Dairy Queen bank account during the period of time it was under the management of Pacific Enterprises: Check No. 12, $7,500? A. That is right, yes.

Q. Check No. 13, $4,295.50?

A. Let me get this.

The Court: Now I am not sure I understand just what you are talking about here. Were these checks allegedly made out to Mr. Thompson?

Mr. Bohn: That's right and funds transferred to him. [75] The only purpose of this line of questioning is to show he has received these monies from the Dairy Queen during the period of its operation.

(Testimony of Edward Thompson.)

The Court: What bearing does it have on the partnership and the corporation?

Mr. Bohn: Perhaps I am asking the question the wrong way. What I am seeking to ascertain is what happened to this money that was part of the assets of the Dairy Queen.

The Court: I understand the purpose of your question then is to bring out that the money was transmitted to Mr. Thompson for the corporation?

Mr. Bohn: Well, I don't know what it was for. It was transferred to him. I misstated the fact to the court and for that I apologize. I think it was certainly true a large portion of that money was used for business purposes. I am simply trying to lay a foundation.

Q. (By Mr. Bohn): Check No. 12?

A. Have you got the month?

Q. What was the amount of the check?

A. $7,500. That one I know, yes.

Q. Did it come to you personally?

A. It came to me personally but it was for American Pacific Dairy and in repayment of the $7,500 loan.

Q. Check No. 13, $4,295.50?

A. Yes, I have that here. [76]

Q. And was that to you personally?

A. This was to me personally. In the same month there were other payments sent to me but they were bank drafts bought by Henry Diza.

Q. I was going through the bank drafts later.

(Testimony of Edward Thompson.)

A. That was made to me personally.

Q. Was that transmitted to the American Pacific Dairy Products?

A. No, it came to me personally to reimburse me for bills paid.

Q. From your own pocket?

A. Yes, for repair parts for the freezers.

Q. Check No. 15—was that made to American Pacific Dairy Products?

A. It says here $4,700, Pacific Dairy Products, but that was for mix. I got that.

Q. The check came to you?

A. Yes, $537.76—that came to me, too.

Q. Check No. 17 for $1,200?

A. That came to me, yes.

Q. Check No. 18 for $5,000?

A. That came to me.

Q. Check No. 19 for $8,000?

A. That was to me, yes.

Q. Check No. 20 for $10,000? [77]

A. I will have to look—yes, I got $10,000.

Q. Check No. 21 for $6,000?

A. Just a minute—I have an idea I got it but I can't find it immediately. I could find it among the canceled checks if you want to hand me my brief case.

Q. While Mr. Phelan is looking for the cancelled checks, there is an unnumbered check dated June 26, 1953. I do not have the amount.

A. I have that, too.

Q. You have that check?

(Testimony of Edward Thompson.)

A. I got that also, yes, because I happened to notice it this morning. The unnumbered check is dated January 26, 1953. It went to Pacific Dairy Products.

Q. How much is that check for?

A. $1,000. It went to American Pacific Dairy Products.

Q. Did you find check No. 21?

A. Yes, for $6,000 made payable to me.

The Court: I don't understand this business of checks being made payable to Mr. Thompson. Are you asking for an accounting here between the corporation and the partnership?

Mr. Bohn: What I am seeking to reach, your Honor, is to prove that—this is what I am seeking to prove by all this line of questioning—that every bit of money which the Dairy Queen took in at any time went to Mr. Thompson or to American Pacific Dairy Products and that the corporation to the extent [78] that they did not spend that money were, in effect, unjustly enriched, if their contention is otherwise sound.

The Court: Is it your contention that you did not pay any bills yourself?

Mr. Bohn: No, your Honor, that is not our contention. I say we paid the small local bills but all the big items were handled by Mr. Thompson himself.

The Court: Is it your contention that you did not place orders and pay them for Stateside——

Mr. Bohn: No, your Honor, we did place orders.

(Testimony of Edward Thompson.)

We placed them with Mr. Thompson and we also sent Mr. Thompson all this money.

The Court: Yes, but is it your contention that all orders for supplies which were placed Stateside were placed through Mr. Thompson?

Mr. Bohn: Substantially all. There perhaps might have been a few small orders which were not but substantially all were handled by Mr. Thompson.

The Court: And except for your local payments you paid him the gross that you received from the operation?

Mr. Bohn: We paid him money as he asked for it and he, in turn, we presume kept a set of records as to what he did with the money. I am simply laying a foundation now.

The Court: Where does the corporation come in?

Mr. Bohn: That is what I would like to [79] know.

The Court: You paid the money. You had a contract with the corporation. Did you ever pay the corporation anything?

Mr. Bohn: Some of the checks are made payable to the corporation. Some of the checks are made payable to Mr. Thompson, which he has testified he used for corporate purposes, as I understand it.

Mr. Phelan: I don't believe he has testified any such thing.

Mr. Thompson: To pay bills mostly.

The Court: Then as I understand it, your con-

(Testimony of Edward Thompson.)

tention is that Mr. Thompson and the corporation are interchangeable?

Mr. Bohn: That is my contention.

The Court: Very well, you have got up to payments of your checks. What do they total?

Mr. Bohn: I do not have the total, your Honor. Do you have the total of these checks?

Mr. Thompson: No.

Mr. Bohn: Well, we can total them at the noon recess.

Q. (By Mr. Bohn): Those checks were all delivered to you either for yourself or American Pacific Dairy Products during the time that the Dairy Queen was under the management of Siciliano or Pacific Enterprises, is that correct?

Mr. Phelan: I think that question is too broad. It is a couple of questions in one.

The Court: I think I understand the purpose of the [80] question which is that when you got these checks Pacific Enterprises or Siciliano was still operating the Dairy Queen?

A. While he was away from Guam, yes, we got the money. Sometimes they were addressed to American Pacific, sometimes to me personally. In either case they would come to the same address and I would open the envelopes.

Q. (By Mr. Bohn): And these checks we just talked about were before Norman Thompson took over as manager, is that correct?

A. Those were, yes, sir.

Q. I am going to ask you about a series of bank

(Testimony of Edward Thompson.)

drafts that were sent to you during this period. On July 13, 1952, did you or American Pacific Dairy Products receive the sum of $506.60 in the form of a bank draft from the Dairy Queen of Guam?

A. $555? Yes, it's earmarked Getz Brothers. It is possible it was sent to me; I don't know.

Q. The figure I have is $506.60.

A. Yes, that went to American Pacific Dairy Products. Offhand I don't know what it was for.

Q. On September 29, 1952, did you or American Pacific Dairy Products receive an additional sum of $2,149.88? A. That is right, yes.

Q. And on the same day did you also receive an additional sum of $5,415.50?

A. 15c this says.

Q. I have 50. Perhaps it is a typographical error, but [81] you did receive that amount or roughly that amount? A. Yes.

Q. Did you receive an additional sum through a bank draft 10/6/52, of $794.03? A. Yes.

Q. And 10/12/52, the additional sum of $245.55 in the same manner?

A. Yes, 65 it says here.

Q. On 10/27/52, did you receive an additional sum of $363.20 in the same manner?

A. I did.

Q. And on 11/10/52, did you receive an additional sum of $1,149.75 through bank draft?

A. Yes, I did. Now when you quote these dates they are the dates they were sent, not the date I received them, but I don't think that is important.

(Testimony of Edward Thompson.)

Q. 11/10/52, there was sent an additional sum of $2,545.17?

A. It shows here—I received the money, yes.

Q. All of those bank drafts were sent to you by Mr. Henry Diza?

A. Sent to me or the corporation.

Q. American Pacific Dairy Products?

A. Yes.

Q. Now the checks were forwarded to you and signed by you in Seattle? [82]

A. That is correct. The amounts were put in but I signed the check.

Q. Now you have also received—withdraw the question. When did Mr. Norman Thompson take over the management of this business?

A. He landed here on Guam on April 22, 1953, and I don't think he took over immediately but he took over soon thereafter.

Q. Now since that time did you or Pacific Dairy Products receive the following sums from the Dairy Queen of Guam: September, 1953, $5,000?

A. Let me look. Yes.

Q. And did you receive an additional $5,000 in October, 1953? A. Yes.

Q. And did you receive in October, '53, also the additional amount of $302.10?

A. No, sir.

Q. Could that have been received the following month?

A. No, they charged me back with $302.10 which I was trying to collect.

(Testimony of Edward Thompson.)

Q. You did not receive that?

A. No, I charged the company with the same invoice twice and my son caught it.

Q. Did you receive the additional amount of $105.09 in October, '53? [83]

A. No, sir, that is another duplication. I charged two invoices twice. It was adjusted and charged back to me. That is how it appears as a charge to me.

Q. In November, 1953, $5,000?

A. Yes, sir.

Q. January, '54, the sum of $36.91?

A. I did, yes.

Q. Also in January, '54, the additional sum of $5,000? A. That is right, yes.

Q. In April, '54, the additional sum of $5,000?

A. Yes, sir.

Q. In May of '54, the additional sum of $5,000?

A. Yes, sir.

Q. In June of '54, the additional sum of $7,000?

A. That is right, yes, sir.

Q. In July of '54, the additional sum of $5,000?

A. Yes, sir.

Q. In September of '54, the additional sum of $5,000? A. Yes, sir.

Q. And in October of '54, the additional sum of $10,000? A. Yes, sir.

Q. Now from your examination of the books and records and from your knowledge of this transac-

(Testimony of Edward Thompson.)

tion has Mr. Joseph Siciliano ever received any money whatever from this transaction?

A. No, he has received nothing that I know [84] of.

The Court: Does that answer also apply to Pacific Enterprises?

Mr. Bohn: I should have asked the question differently, your Honor.

Q. (By Mr. Bohn): Has the Pacific Enterprises ever received any money?

A. I think they received a few small amounts for supplies and that is all.

The Court: 12 o'clock, gentlemen. We will recess until 1:30. I again remind you I would like to have these pretrial orders either approved or corrected.

(The court recessed at 12:10 p.m., February 14, 1955, and reconvened at 1:30 p.m., February 14, 1955.)

The Court: Before you continue, what about the pretrial?

Mr. Phelan: On the one in this case on the findings of fact there are a couple I disagree with, Judge.

The Court: I beg your pardon?

Mr. Phelan: There are a couple of statements in the findings of fact that we haven't admitted, one of them on the second page of that pretrial order. We haven't admitted the building wasn't completed. At the top of the second page that para-

(Testimony of Edward Thompson.)

graph is confusing. We haven't admitted that. That's the plaintiff's contention.

The Court: Yes.

Mr. Phelan: But it is set up there, is it not, as if it [85] were an admitted fact at the pretrial?

The Court: No, the pretrial order, of course, merely recites what the plaintiff contended at the pretrial conference. It couldn't mean that you admitted it.

Mr. Phelan: No, I didn't intend to admit anything.

The Court: No, you didn't so I don't think that is material. What else did you have in mind? The important thing is whether it correctly states your contentions.

Mr. Phelan: May I see it for a second. I haven't got my copy with me.

The Court: Yes.

Mr. Phelan: My contentions are correct, yes.

The Court: Yes, well then that's all that you are concerned with. Will you take the stand, Mr. Thompson, please. Continue, Mr. Bohn.

Mr. Bohn: Before continuing with this witness, your Honor, I would like to state to the court that we made a hasty calculation of the total of those figures about which I asked this witness this morning—the amounts received by himself or American Pacific Dairy Products. I would like to state that if our findings are correct and subject to whatever mathematical corrections may be needed, the total amount is $118,979.44.

(Testimony of Edward Thompson.)

The Court: Now that is the entire——

Mr. Bohn: That represents the sum total of all the amounts I asked him about this morning, checks or bank drafts [86] which were sent to him or American Pacific.

The Court: Yes, you got him through 1953 and 1954?

Mr. Bohn: That is correct, for the whole period of operation. In other words, part of it was for the period of time that the Siciliano organization was operating and part of the figures were for the time Norman Thompson was operating.

The Court: In other words, your contention is that $118,979.44 has been sent to Seattle?

Mr. Bohn: That is correct, your Honor.

Mr. Phelan: The way that is set up, I think is confusing because some checks, it was testified, were drawn to the corporation and some to Mr. Thompson personally. I think it should be broken down.

The Court: Well, we have nothing before us at the present time as to how this money was distributed. It is conceded that part of it was for the purchase of supplies.

Mr. Phelan: Yes, but it was testified that some of those checks were drawn to the order of the corporation and others drawn to Mr. Thompson's order.

The Court: Yes, it was made clear that these transmittals did not distinguish between Mr. Thompson and the corporation.

Mr. Phelan: It wasn't made clear to me.

(Testimony of Edward Thompson.)

The Court: They considered them interchangeable. In other words, if it was profit and it was sent to Mr. Thompson then I presume that he paid it into the corporation. [87]

Mr. Phelan: There is no contention any profit was sent to anybody.

The Court: Well, you have the opportunity now to show what Mr. Thompson did with the money.

Mr. Phelan: First of all I want the figures to show how much he got and how much the corporation got.

The Court: Well, if they made notes they will try to advise you of that and anyway, I strongly suspect Mr. Thompson is in a much better position than any of us to advise of that. He is an accountant. This was my suggestion; I wanted to find out what the total was.

Q. (By Mr. Bohn): Now, Mr. Thompson, you have in those records before you a list of monthly—series of monthly reports setting forth gross sales, profit, trial balances, and various monthly figures, is that correct? A. I don't know.

Q. I beg your pardon?

A. I said I don't know; I will have to look. We have a number of them. I don't know whether they are complete or not, but I have some in here, yes.

Q. May I see them, please? A. Yes.

Mr. Bohn: I apologize to the court for being a little clumsy about this. I think I will ask him questions and ask Mr. Thompson to find the [88] reports.

(Testimony of Edward Thompson.)

The Court: You don't expect to take up the time of the court, do you, while Mr. Thompson looks through a whole series of reports until he finds the one to which you refer?

Mr. Bohn: Well, I have it in my record. I think he has reports for every month the business operated except one, and I want to get that information before the court.

The Court: Well, proceed.

Q. (By Mr. Bohn): Mr. Thompson, I will ask you to look at that series of reports and is there a report there for the period ending June 30, 1952?

A. I have a trial balance; it's a trial balance.

Q. A trial balance? A. Yes.

Q. And that trial balance shows sales from June 22, 1952, to June 30, 1952, of $3,006.65, is that correct? A. Yes, sir.

Q. All right. Do you also have a trial balance for the period ending July 31, 1952?

A. Yes, I have that.

Q. And does that show cumulative sales as of that date of $13,161.70? A. Yes.

Q. Do you also have a cumulative report for the period June 22, 1952, to 8/31/52, which would be August 31, 1952, showing total cumulative sales as of that date in the amount of $20,570.10? [89]

The Court: Now are you talking about cumulative sales?

Mr. Bohn: That is correct.

The Court: From June 22?

Mr. Bohn: That is correct.

(Testimony of Edward Thompson.)

The Court: To August 31?

Mr. Bohn: These reports are made in the form of accumulation. They started on June 22 and then each month the previous month is added so you get an accumulated total.

The Court: Now this is your gross?

Mr. Bohn: That is correct.

The Court: And that is August 31?

Mr. Bohn: August 31 I asked if the total was not $20,570.10?

Mr. Thompson: That is right.

Q. (By Mr. Bohn): Do you have a fourth report, trial balance, showing the total sales and the estimated profit from June 22, 1952, to September 30, 1952?

The Court: Now all you are putting in the record here is your gross sales. You are asking him now about profit.

Mr. Bohn: This is the first report that profit was shown. That is why I didn't ask him that on previous question.

The Court: That is what date?

Mr. Bohn: September 30, 1952.

Mr. Thompson: Oh, yes, here is the estimated profit.

Q. (By Mr. Bohn): Were the total sales to that date [90] $28,817.80? A. $28,817.80, yes.

Q. And was the estimated profit as of that date $13,235.30? A. Yes, sir.

Q. Calling your attention to the fifth report, that

(Testimony of Edward Thompson.)

is for the period ending October 31, 1952, from June 22, 1952, to October 31, 1952——

A. Yes, all of these were prepared by Diza.

Q. That was going to be my next question. All these reports we are now talking about were prepared by Henry Diza?

A. That is correct, sir.

Q. What does that report show?

A. What date is that?

Q. That is as of October 31, 1952, $32,467.90?

A. Yes.

Q. Does that report include a profit and loss statement which shows a profit of $13,612.50?

A. Yes, sir.

Q. And do you have in your possession a sixth report for the period ending November 30, 1952?

A. Yes.

Q. And the gross sales up to that date as shown by that report are $40,551.85?

A. Yes, sir. [91]

Q. And the total profit as of that date is stated as $16,631.16? A. Yes, sir.

Q. And do you have a seventh report, also prepared by Diza, showing the period ending December 31, 1952? A. Yes.

Q. And does that report indicate a total of sales to that date of $49,091.78? A. Yes, sir.

Q. And does it also show an adjusted profit of $15,887.98? A. Yes, sir.

Q. Was that an end-of-the-year adjustment according to that report?

(Testimony of Edward Thompson.)

A. No, there was an error in the report.

Q. Now do you also have in your possession an eighth report for the period from the beginning of that business to January 31, 1953?

A. January 31, 1953?

Q. Yes, sir. A. Yes.

Q. And as of that date does the report indicate total sales accumulated as $57,626.08?

A. That is right.

Q. And profit accumulated to that date of $21,-986.83? A. That is right, yes. [92]

Q. And do you also have a ninth report for the period ending February 28, 1953? A. Yes.

Q. And is it true that that report indicates total sales of $64,416.63? A. Yes, sir.

Q. And does it also indicate a profit as of that date of $24,219.74?

A. That is what the figures show here on these reports.

Q. And do you have a tenth report also for the period ending March 31, 1953? A. Yes.

Q. And does that indicate gross sales as of that date of $73,067.83? A. That is right.

Q. And profit of $29,440.62?

A. That is right.

Q. Now that report was for the period ending March 31, 1953. Is it true, Mr. Thompson, that your son, Norman Thompson, took over the management of the business and reporting as of April 22, 1953?

A. No, he landed on Guam April 22, so I would say it was after that date. These reports for '53

(Testimony of Edward Thompson.)

Norman made them. The books hadn't been written up since the year before.

Q. So the last report Norman compiled? [93]

A. He compiled January, February, March and April and the rest.

Q. So the figures were given to him and he compiled them from the information he had?

A. Yes.

Q. There is also a report, is there not, for the period ending April 30, 1953, showing total sales, $81,361.03? A. That is right.

Q. And profit as of that date, $30,823.04?

A. That is right, yes.

Q. And there is a further report for the period ending May 31, 1953, showing total sales, $91,806.67?

A. Yes.

Q. And profit, $31,403.47?

A. That is right.

Q. That was reported by Norman Thompson also?

The Court: What was that last figure?

Mr. Bohn: Profit, $31,403.47.

Q. (By Mr. Bohn): Do you have a report available for the period ending June 30, 1953?

A. There should be one but I haven't found it yet. That seems to be missing.

Q. As a matter of fact, Mr. Thompson, you know it's missing, don't you? A. No. [94]

Q. When was the last time you saw that report?

A. June 30? I don't know. Did I see it?

Q. I don't know. I am asking you.

(Testimony of Edward Thompson.)

A. These I haven't the slighest idea I ever saw them before. These were prepared and kept here.

Q. They were never sent to you?

A. Copies were.

Q. Do you recall having seen a copy of any report for the period ending June 30, 1953?

A. I should have but I don't remember right now, no.

Q. Will you check your general ledger and tell us what is in the general ledger for the period ending June 30, 1953?

A. Oh, that is right. There is nothing in the general ledger for that month.

Q. Will you check your cash book and tell us if there is anything in that?

A. There is none there, no.

Q. This was the period that Norman Thompson was keeping the books?

A. At that time I was keeping the books in Seattle. I was going to send duplicates to him. In July, 1953, I think I sent him the reports in Seattle and they should be over here.

Q. Those are the records that were missing?

A. Some of them, yes. I assume mine are exact copies of these but I don't know. [95]

Q. Are these the reports lost in the mail as mentioned by your previous affidavit?

A. Yes, sir. I assumed they were lost. We got one package today with some stuff in it but not these reports.

(Testimony of Edward Thompson.)

Q. When was the last time you inquired at the post office as to these missing reports?

A. We went in there this morning and we got one package off the Luckenbach.

Q. Prior to that when was the last time?

A. My son has been going in.

Q. Did you make the inquiry this morning?

A. Yes.

Q. Were you with him? A. No.

Q. So you don't know whether he did or not?

A. Yes, he came home with a package.

Q. I am going to show you, Mr. Thompson, an affidavit which has been previously filed in this court, a copy of which was served on me. It is dated February 8, 1955, and I am going to ask you to read that affidavit—not aloud but glance through it and see if that is your signature?

A. That is right. That's my signature.

Q. Now in that affidavit you stated substantially as follows: That prior to your departure from Seattle on the 27th day of December, 1954, that you directed that there be mailed by [96] means of United States Mail, postage prepaid, a package containing numerous documents, duplicate invoices, letters and other papers from the file of the corporation maintained at the main office, City of Seattle, State of Washington, addressed to the office of the corporation of the Dairy Queen of Guam; and despite every attempt to locate this package, it has never been received and cannot be located in the United States Post Office.

(Testimony of Edward Thompson.)

A. If I said "a" package, there were more than one package; there were seven packages sent.

Q. And how many of the packages were lost?

A. There were two lost up to this morning but we have gotten all but one now.

Q. When was the last time you received any?

A. A week or so ago, I guess.

Q. When was the last time you made inquiry for documents at the Post Office?

A. Well, I actually didn't make inquiry. Norman knows the men down at the Post Office. He would say "We are looking for packages. Give another look." Usually he got to slip down to the Post Office pretty often.

Q. Wasn't the last time February 3, 1955?

A. That is not true.

Q. Is it not a fact that on February 3, 1955, there was delivered to you a package from the Post Office, is that correct?

A. Oh, I got a number of packages. I don't know whether [97] it was February 3, or not. Yes, I received probably ten packages from the States since I have been here.

Q. And is it not also a fact that you stated these are the documents you had been looking for?

A. No. I might have said so. This is one of them but that was not all of the packages.

Q. Is it not a fact that prior to February 3 you personally made several inquiries at the Post Office?

(Testimony of Edward Thompson.)

A. No, my son made all of them. I was standing there but he made the inquiries.

Q. Is it not also a fact that you have never made any inquiries since February 3—between February 3 and the date of this affidavit, February 8?

A. That is not true, no, sir.

Q. Now let's get back to the report for the month of June, 1953. Do you state to this court that report is part of the missing documents?

A. I don't know whether I made a report for June, '53, or sent a copy over here or not. I took off a trial balance and opened up a set of books for Guam and sent them over here.

Q. Will you find the entries for June, '53.

A. They are not in there because I started with July.

Q. Do you have any knowledge as to the figures for June?

A. I forgot for a moment that I didn't have complete records here. Those are in my file in Seattle. [98]

Q. You have no independent recollection of them?

A. No, sir, except by the process of elimination. Take July and go back.

Q. Let's take July. Do you have a report for the period ending July 31, 1953? A. Yes.

Q. And what were the—withdraw that question. Does that report indicate gross sales for the period June 22, '52, to July 31, '53, total gross sales of $91,298.17, is that right? A. Yes.

(Testimony of Edward Thompson.)

Q. And does it also indicate a profit as of that whole period of $16,077.36?

A. Yes, sir. No, not for that whole period.

Q. What is that profit figure?

A. This one my son made up. That is what it showed but it's wrong; I can tell you that.

Q. What is the right figure for that period?

A. July, '53? It should probably be $26,326.80.

Q. It should be $26,000 but it's $16,000?

The Court: What period are we talking about now?

Mr. Bohn: We are talking about the period June 22, 1952, to July 31, 1953, accumulated sales and accumulated total profit.

The Court: According to the statements here as of May 31 you had accumulated total sales of $91,806 and profit, $31,403. [99]

Mr. Bohn: That was going to be my next question—what happened to the sales and what happened to the profit for the months of June and July?

The Court: Now you claim that there is a statement as of when?

Mr. Bohn: I do not know, your Honor. I only claim Mr. Thompson has verified that there is no report for the month of June, 1953, and I respectfully point out to the court that the reports of Norman Thompson as of May 31 indicate sales of $91,806.67. The next report we find in the file, two months later, indicates gross accumulated sales of $91,298.17.

(Testimony of Edward Thompson.)

The Court: Yes, I understand. You are asking for a reconciliation.

Q. (By Mr. Bohn): Can you reconcile those figures for us, Mr. Thompson?

A. In a moment I can, yes; I think I can. Yes, this report is wrong.

Q. Which report is wrong?

A. The one that Norman made.

Q. As of what month?

A. As of July 31, '53. The profits are down considerably because he left out the inventory.

Q. Yes, will you explain?

A. I can see it now as cost of goods sold. He had mix, $1,281.29. That was the total amount of mix and there was still [100] mix on hand that should have been deducted from the total cost of the mix.

The Court: That would have no bearing on sales?

A. No. Now I will go back to sales. When Norman took it over we went back and filed tax returns on the corporation on the theory the partnership had never been consummated. The corporation had a fiscal year ending in August so the sales of June, '52, July and August would be deducted from this amount. You follow me, your honor?

The Court: Yes.

A. If you add those sales for those three months it would be considerably more than the $91,000 shown.

Q. (By Mr. Bohn): What do your records

(Testimony of Edward Thompson.)

show the total accumulated sales were as of July 31, 1953?

A. They do not show because we cut them off as of August 31, 1952, and then started again.

Q. Well, then, let me see that report.

Mr. Phelan: It seems to me we are off on the wrong tack here. Mr. Bohn is trying to account for the period when Mr. Siciliano had control of it from Mr. Thompson. I think all Mr. Thompson can do is say what the books show——

The Court: I am afraid you haven't been following the testimony, Mr. Phelan.

Mr. Phelan: Yes, I have.

The Court: The testimony is while Mr. Siciliano was [101] running it they got the monthly statement of gross sales and profits and they have made reference to those. In April of '53 Mr. Siciliano or the Pacific Enterprises had nothing to do with it. Mr. Norman Thompson took over and we are now dealing with a period where we have no accounting after Norman Thompson took over.

Mr. Phelan: Yes, what I meant was that these are cumulative figures month by month and in the early months all he can tell us is what the figures are. We have nothing but what is on a piece of paper. It's all based on that.

The Court: Yes, it appears that you admit you received over $100,000 so somewhere along the line it has to tie in.

Mr. Phelan: Yes, I realize that but——

The Court: To be short, Mr. Bohn is asking this

(Testimony of Edward Thompson.)

witness why adequate records were not kept for June and July and August.

Mr. Phelan: That is perfectly all right as far as I am concerned but the figures from June of '52 were cumulative figures and they are based upon entries in the book and all he can do is read the entries off.

The Court: These are based upon reports.

Mr. Phelan: But a report is only a conclusion, your Honor.

The Court: A report, of course, may be a conclusion, but as an accountant I am sure this witness will agree that if he receives a balance and loss statement for a month's business [102] he assumes that the reports have been taken from the proper books of entry.

Mr. Phelan: Yes, but I don't see how he can testify as to those first ones as to their accuracy.

The Court: He is not testifying as to their accuracy; he is just testifying as to what he received.

Mr. Phelan: I just want to get that in the record.

Q. (By Mr. Bohn): Let's get back to this statement, the profit and loss statement for July, 1953, and the financial statement, July 31, 1953. This profit and loss statement contains a notation on it in pencil reading as follows: "Copy of what I sent to dad." Is that in the handwriting of Norman Thompson? A. Yes.

Q. And that is what he sent to you?

A. I assume it is, yes.

(Testimony of Edward Thompson.)

Q. Are you certain? A. That is right, yes.

Q. Now will you examine this and tell us if that is what he sent to you?

A. I can't remember whether this is exactly what was sent to me; I assume it is and I believe him but that is all. I can't tell whether this was sent to me.

Q. Now in this profit and loss statement there is a statement, sales $91,298.17? [103]

A. That is right, sir.

Q. Will you check whatever records you have and tell us what period is covered by that item?

A. I can tell you it is the period from June 22, 1952, through July 31, 1953.

Q. Where are there any reports in the books to show the sales and profit between the period June 30 and September 1, of '52?

A. Well, those are in the Seattle office. No—between June 30——

Q. From the date the Dairy Queen opened to the period you now state you used as a cut-off period in '52. Where are the records on that period?

A. August 31, '52—we just called those off.

Q. Those are the figures? A. Yes.

Q. Then as of July 31, '53, the total sales figure of $91,298 does not represent the complete amount of total sales from the beginning of operations to that period? A. No, sir.

The Court: I want to get this clarified. That represents then a corporate figure based upon their

(Testimony of Edward Thompson.)

fiscal year? A. That is right, sir.

The Court: And has nothing whatever to do with the accurate reports or with the conditions which may have prevailed [104] at the Dairy Queen in terms of local bookkeeping?

A. Oh, yes, it does but we cut off the fiscal year as of August 31, '52, because that is the corporation's fiscal year.

The Court: Yes and presumably figures for the months of June, July and August appeared in your previous report?

A. That is correct, sir. We didn't actually make the report up, but if you add to those sales the sales we eliminated, you will get the total sales for that period.

Q. (By Mr. Bohn): Do you have anywhere anything indicating—withdraw that question. What did you do with the profit which was earned between June, '52, and August 31, '52? Did you make a tax return for that period?

A. August 31, '52? We made a return, yes.

Q. What was the profit shown at that time?

A. I don't remember.

Q. Do you have those records here?

A. No, they would be in Mr. Little's office. He is secretary-treasurer.

Q. So all those records are in Seattle?

A. Of course they were filed on Gaum, the original, but the copies of the tax returns are in Mr. Little's office.

(Testimony of Edward Thompson.)

Q. Now if these reports are accurate there would have been total sales of $20,570.10 as of August 31, 1952? A. That is about right, yes.

Q. You do not know what the profit was? [105]

A. No.

Q. Are there anywhere in those books any indications what the profit was?

A. In the Seattle books, yes.

Q. But not in the books here?

A. They started as of July 31, '53.

Q. Do you not maintain any books on Gaum indicating total sales and what profits were made?

A. It is possible in the books Henry kept. I don't know.

Q. I am asking you now what you have. Do you have anywhere on Guam any books that would indicate how much money was made for the period ending August 31, 1952? A. No.

Q. You do not know how much profit was made for that period?

A. If the books wouldn't show it, no.

The Court: Now, before we get too confused here, what is your figure as of September 20, 1952, of total sales of $28,817, and profit of $13,325? Would that be exclusive of every month except September?

Mr. Bohn: Yes, those were and those were the reports prepared by Mr. Diza and the purpose of my last question—apparently—I say apparently—maybe I am not entitled to make that assumption—what they did was to take these documents back

(Testimony of Edward Thompson.)

there and make a series of adjustments on them. [106]

The Court: Bear this in mind that you have to exclude from the reports prepared by the corporation the months of June, July and August of 1952, then you should be on an annual basis beginning as of the 1st of September, 1952.

Mr. Bohn: That is correct.

The Court: So that all we have in dispute then is the period from June 22, to August 31, '52, and you have your accurate figures on that.

Mr. Bohn: We have them from our report, yes.

Q. (By Mr. Bohn): Now to go one step further then—perhaps this is a duplicate question. If so I am sorry. The reports that you have testified to so far indicate as of May 31, gross sales of $91,000 plus and as of July 31, $91,000, somewhat less than the previous report. You stated that the reason for that differential is that it reflects a different period of time and that the figure, $91,298.17, is for the total sales to July 31, '53?

A. That is correct, yes, sir.

Q. Now you have in the same balance sheet—what figure did you put in there as surplus?

A. He says "surplus using your figures, $26,326.80."

Q. Well, now at that time I assume surplus is profit of $26,000? A. That is right, sir.

Q. Now that plus the profit made for the months of June, [107] July, August, '52——

A. Yes, sir.

(Testimony of Edward Thompson.)

Q. In addition to that figure?

A. No, sir, that is the profit up to July 31, '53, according to this statement.

Q. Let me ask the question another way, then. The report prepared by Mr. Norman Thompson for May 31, indicates a profit of $31,403.57?

A. That is right.

Q. You stated you made adjustments because you changed to the fiscal year. How do you account—withdraw the question. Will you please reconcile the $26,000, surplus figure, which you show, with the profit reported for the previous month? A. Which was that?

Q. Well, the profit as of May 31, according to these reports was $31,403.

A. I don't know whether this is correct or not. He says "using your figures." I notice on the financial statement there is no inventory. This might be wrong, you know. I can't tell offhand.

Q. Well, Do you have a statement that is right?

A. Probably the following month. I haven't looked at that. He shows a surplus of $26,326?

Q. Something like that, yes. May I borrow it?

A. You want the June? [108]

Q. July 31. I understand there are no reports for June? A. That is correct, sir, yes.

Q. On the financial statement you show a surplus and the language in parentheses is "using your figures"? A. Um huh.

Q. That was prepared by Norman Thompson, wasn't it? A. Yes.

(Testimony of Edward Thompson.)

Q. It is a fair assumption when he says "using your figures," he means yours, Edward Thompson's? A. I think it is so, yes.

Q. That is $26,000 some odd. Now, turning to the profit and loss statement, it also contains the notation "copy of what I sent to Dad." There is the statement "net profit for the period, $16,077.36." Now, is that the net profit in addition to the $26,000 surplus?

A. No; that net profit figure is wrong, of course.

Q. Well, I am just asking you how it was arrived at.

A. I didn't arrive at it. I couldn't tell you how he got it, but I can see a discrepancy.

Q. I concur. Proceeding then to the next report which is as of August 31, 1953, do you have a report there showing gross sales of $99,607.42?

A. That is right, sir, yes.

Q. And a profit of $26,966.70?

A. $26,966.70 did you say? [109]

Q. Is that right, $26,966.70?

A. This has been scratched up. $26,966.70, yes, I do see it, yes.

Q. Now, what period of time does that profit figure represent, from when to when?

A. That represents the year ending August 31, 1953, from September 1, '52.

Q. And it was in addition to any profit that has been earned prior to September 1, '52?

A. Yes, sir.

(Testimony of Edward Thompson.)

Q. May I see it again? I would like to see the July 31 one. Now, in the July 31 one you show a surplus "using your figures" of $26,326.80. That you testified was the profit in——

A. I didn't testify that was what showed as profit. I didn't audit these books.

Q. Can you reconcile or explain the fact that your August 31 figure for total profit for the period is within a very few dollars of your surplus as of July 31?

A. No; I can't explain. I don't know the answer to that.

Q. We will now proceed with the permission of the court to the next report. You have a report for the month of September, 1953, is that correct?

A. Yes, sir.

Q. You started a new year at that time, is that right? A. That is correct, yes. [110]

Q. In that report you show sales of $7,845.00?

A. That is right, yes.

Q. And it shows profit for the month of September, $2,133.15? A. Yes, sir.

Q. And do you also have a report there for the period from September 1, '53, to October 31, '53, showing total amount of accumulated sales, $15,312.79? A. What date?

Q. October 31.

A. Oh, October 31. You jumped.

Q. Well, I didn't mean to jump. I meant my prior figure to be for the month of September and

(Testimony of Edward Thompson.)

this is the second report in the new year. That would be for the period ending October 31, '53?

A. That is $15,312.79.

Q. And the profit, $4,381.06?

A. That is right, yes.

Q. Do you also have a report there for the period, September 1, '53, to November 30, '53?

A. That is right, sir, yes.

Q. Sales, $22,564.24? A. That is right.

Q. Profit, $5,476.72?

A. That is right. [111]

Q. And you also have a report for the period September 1, '53, to December 31, '53?

A. That is right.

Q. Showing sales accumulated from the September 1 date of $29,295.89? A. That is right.

Q. And a profit in the second year to that date of $6,420.45? A. That is right.

Q. You also have a report there for the period September 1, '53, to January 31, '54?

A. That is right.

Q. Showing total sales, $35,946.75?

A. That is right.

Q. And profit, $7,915.26?

A. That is right, sir.

Q. And you have a report for the period September 1, '53, to February 28, '54?

A. I have it.

Q. Sales, $42,031.07? A. I have it.

Q. And accumulated profit for the second year,

(Testimony of Edward Thompson.)

or, rather, for the period beginning September 1, '53, to February 28, '54, of $8,471.17?

A. Yes, sir. [112]

Q. You have a report for the period September 1, '53, through March 31, '54?

A. I have it, yes.

Q. Does that report indicate sales of $48,723.93?

A. That is right.

Q. Profit from September 1, '53, to March 31, '54, of $9,465.68? A. Yes.

Q. You have a report there for the period from September 1, '53, to April 30, '54? A. Yes.

Q. Sales, $55,193.13? A. That is right.

Q. Profit, $10,311.33? A. Yes.

Q. And you have the same information for the period ending May 31, '54? A. Yes.

Q. Sales, $61,779.43? A. That is right.

Q. Profit, $11,262.20?

A. That is correct, sir.

Q. You also have a report for the period ending June 30, '54? A. That is right. [113]

Q. Sales, $68,162.33? A. That is right.

Q. Profit, $12,914.45?

A. What was that again?

Q. I am sorry—$12,914.45. A. Um huh.

Q. July 31, '54, sales, $75,171.98?

A. That is right.

Q. Profit, $15,091.96?

A. That is right, sir.

Q. August 31, '54, from September 1, '53, sales, $81,000.73? A. That is right, sir.

(Testimony of Edward Thompson.)

Q. August 31, '54, from September 1, '53, profit, $16,590.03? A. That is right.

Q. Now, did you close your books as that is the end of the fiscal year again? A. That is right.

Q. Now, from your records, what was the total recorded this business made from the beginning of its organization to that period, August 31, '54?

A. Net profit after income taxes, $29,359.17. The ledger shows that after income taxes.

Q. That includes——

A. Everything. [114]

Q. That includes everything?

A. From the beginning.

Q. From the beginning. It includes the figure of $13,235.30? No, withdraw that question. It includes the report from the period June 22 to September 1, '52, is that correct? A. Yes.

Q. It includes the period of time from September 1, '52, to August 31, '53?

A. That is right, yes.

Q. And it includes the period of time from September 1, '53, to August 31, '54?

A. That is right, yes.

Q. Less taxes? A. After taxes, yes.

Q. What were the total amounts of income tax paid for each of those three periods?

A. I don't have it—only for the last period.

The Court: Was this income tax paid in Guam?

A. Paid on Guam, yes.

The Court: You had no income in the United States?

(Testimony of Edward Thompson.)

A. No, sir. For the last fiscal year we paid $8,500 plus, roughly.

Q. (By Mr. Bohn): You paid $8,500 income tax for the period ending August 31, '54, is that correct?

A. That isn't an exact figure, but it is fairly close. [115]

Q. That would presuppose a gross profit of about what?

A. I couldn't say. I would have to see the income tax returns.

Q. Do you have those income tax returns with you?

A. No, sir; they are in Mr. Little's office.

Q. He is the one who keeps them? Who prepares them?

A. I do and he goes over them and checks, but I prepare them.

Q. What do your books show as profit for the year September 1, 1953, to August 31, 1954, after taxes?

A. I would have to analyze these books. We don't have any one lump figure here. We credit profit with the sales and we charge profit and loss with the expenditures and income tax we charge profit and loss also.

Q. Your books do not reflect how much money this business made from September 1, 1953, to August 31, 1954?

A. It does but not in one figure. I can reach out but I would have to make substantiations.

(Testimony of Edward Thompson.)

Q. Perhaps we can make those later on. Do your books show how much taxes were in the year ending August 31, '53?

A. Wait a minute—this $8,000 taxes was for '53.

Q. For '53?

A. Yes; I got the wrong numbers.

Q. Do you have any figures as to your profits before taxes for the year September 1, 1952, to August 31, '53? [116]

A. Yes; we have those. I would have to figure those.

Q. You can figure that later on?

A. Yes; it is a short analysis but I would have to make it.

Q. How much tax did you pay for the year ending August 31, '54?

A. Considerably less than the first payment. We only paid the first installment which amounted to $1,689.55.

Q. How many installments are due?

A. I don't know. Norman can tell you. I can see what's been paid and that is all; I don't know.

Q. You paid $8,500 for the period September 1, 1952, to August 31, 1953? A. Yes.

Q. And you paid $1,600 on account on monies owing for the next year? A. That is right.

Q. And the balance is still due?

A. That is right.

Q. When is it paid? A. Quarterly.

Q. You made the first payment when?

A. November.

(Testimony of Edward Thompson.)

Q. And when is the next payment due?

A. February or March.

Q. Well, three months? [117]

A. February some time, yes.

Q. Has it been paid?

A. I don't know whether it has been paid or not.

Q. Do your books reflect whether it has been paid? A. They haven't been posted as paid.

Q. I am just asking you what is in your books.

A. No; I don't think it has been paid but I wouldn't know. They send us a notice.

Q. Getting back to this series of reports, do you have a report there for the period—I beg your pardon—for the month of September, 1954?

A. Yes, sir.

Q. And does that indicate sales of $4,324.15?

A. That is right, yes.

Q. And does it indicate a loss of $2,339.94 for that month?

A. That is what it indicates but that is not true.

Q. What is the true figure?

A. Here is what happened: There was an error in inventory and he caught it after he sent in this report. We knew we didn't lose that money. What happened, he figured the inventory at a thousand instead of per case.

Q. You picked it up when he sent it to you?

A. I checked it back. It didn't make sense to me.

Q. You checked them? [118]

A. Yes; the one Henry sent to me showed a loss of $5,000 and I wrote him and told him it was obvi-

(Testimony of Edward Thompson.)

ously wrong. I wrote him and told him and he found he had omitted——

Q. Let's find the report where he showed the loss of $5,000.

A. It wouldn't show a loss of $5,000 on that report but on the cumulative report.

Q. Accumulated profit of $15,887.98?

A. Wait a minute now—after correction.

Q. After correction?

A. Yes; this was corrected after I called attention to the mistake. I can show by analyzing it, I hope. I am speaking before I look. We had a loss of $5,200 in the month of December, 1952. Well, that is obviously a mistake. I know I wrote them and told them to check back and they found it.

Q. As a matter of fact, as a certified public accountant, if you find errors you notify them?

A. Yes.

Q. That is true throughout the whole operation?

A. Sure.

Q. And the report we were talking about showed a loss and you state that was in error?

A. Yes.

Q. You don't have a corrected report there?

A. We didn't make a corrected report. [119]

Q. Now, for the period from September 1, '54, to October 31, '54, do you have a report there?

A. Yes, sir.

Q. You show accumulated sales of $9,167.65?

A. Yes.

Q. And net loss, accumulated loss, of $1,347.54?

(Testimony of Edward Thompson.)

A. That is right, yes, sir.

Q. Do you have another report for the period September 1, '54, to November 30, '54?

A. I will have to look. I don't see that one; it doesn't mean it isn't here, but I can't see it here.

Q. Well, in the interests of saving time, would this refresh your memory? My notes on the report state that the total sales from September 1, '54, to November 30, '54, as indicated in this report, are $13,937.40?

A. I would say that is very close.

Q. And the net loss for this period was $2,200.32? A. That is right, yes.

Q. Now, I don't wish to put words in your mouth. Is that correct?

A. That is close to it. Sales dropped off sharply in the last four or five months.

Q. Do you have a report for December?

A. No, I haven't. It hasn't been made yet.

Q. It hasn't been made yet? [120] A. No.

Q. Do you have postings for profit or loss for the period ending December 31, '54, in your ledger?

A. Yes; they are posted.

Q. What are they?

A. I would have to make up a report. Those profit and loss reports are made from a work sheet and that hasn't been done yet.

Q. It has been posted? A. Yes.

Q. The ledger has been posted but the report has not been prepared? A. Yes.

Q. You are a month or two behind on that?

(Testimony of Edward Thompson.)

A. Probably because I was here and I have taken up some of his time.

Q. Now, Mr. Thompson, is it true that beginning on or about November 30, 1953, and continuing through December, 1954, various sums totaling $26,740.63 were spent for the benefit of a corporation known as Guam Frozen Products, Inc.?

Mr. Phelan: By who? I think you should make clear who spent the money.

Mr. Bohn: Well, first of all, let's find out if it was spent by Dairy Queen. Let's find out if it was spent.

A. American Pacific spent the money. [121]

Q. (By Mr. Bohn): Now, the funds were taken from the funds of the Dairy Queen of Guam, is that correct?

A. The funds were taken from American Pacific Dairy Products but the funds of Dairy Queen were put in the American Pacific Dairy Products.

Q. When did you establish a bank account?

A. Shortly after Norman Thompson got here.

Q. So all the receipts of the Dairy Queen went into an account known as American Pacific Dairy Products? A. Yes.

Q. Did anything other than receipts from the Dairy Queen of Guam go into that account?

A. I couldn't say. Miscellaneous receipts would go in there, yes.

Q. From what source?

A. Any source; I don't know.

(Testimony of Edward Thompson.)

Q. What line of business is American Pacific Dairy in?

A. No other line of business. If there was miscellaneous receipts they would go in there but I don't know of any miscellaneous receipts.

Q. So your testimony is that all the money in the account of American Pacific Dairy Products established in the Bank of America, Agana, Guam, came from Dairy Queen, is that correct?

A. I would say so, yes. [122]

Q. Well, is that wrong?

A. No; it is right.

Q. Now, from that account there was spent $26,740.63 for the benefit of a corporation known as Guam Frozen Products, Inc.?

A. That is right, sir, yes.

Q. When did those expenditures start?

A. The first one was in November, 1953.

Q. And they continued, roughly, a certain amount each month on through December, 1954?

A. In smaller amounts, yes.

Q. The cumulative total was $26,740.63? Does that represent the total expenditures?

A. No; that represents the total amount charged there. Oh, yes, we have a total here as charged to the account of $26,740.63. Included in that was $3,200.27 of supplies like mix, containers and so forth but the store was not opened promptly. We had trouble getting it open so we took them back to the warehouse and used them in the other store so the correct amount spent was about $23,000 plus.

(Testimony of Edward Thompson.)

Q. And the difference was for supplies ordered by Dairy Queen operation, delivered by the Dairy Queen operation to Guam Frozen Products and then taken back because they weren't ready to open?

A. We don't call it Dairy Queen. We call it American Pacific Dairy. [123]

Q. The sign is "Dairy Queen."

A. The store is the Dairy Queen.

Q. Do you have a cancelled certificate of co-partnership agreement filed with the Government of Guam? A. No.

Q. To your knowledge is that still in existence?

A. I haven't the slightest idea.

Q. It is possible the public, at least, thinks this is still a partnership operated by American Pacific Dairy and Joseph Siciliano?

A. I don't think the public would go down and read the articles of incorporation. I don't know what the public believes.

Q. I am stating that this was a partnership and you were doing business under the fictitious name of Dairy Queen of Guam——

A. I didn't cancel that. I said that before.

Q. Do your books show a credit in the account of Guam Frozen Products in the amount of $17,500?

A. Yes, sir.

Q. And does that show it was credited to Guam Frozen Products in exchange for stock?

A. Yes, sir.

Q. And stock was actually issued?

A. Yes, sir.

(Testimony of Edward Thompson.)

Q. Stock in Guam Frozen Products was issued to who? [124]

A. The greater part was issued to American Pacific Dairy Products, one share issued to Norman Thompson and one share issued to me.

Q. And the balance issued to American Pacific Dairy Products? A. Yes, that is right.

Q. Now, the difference between the $17,500 stock purchase and the balance spent out of this account—how is that accounted for?

A. That is accounts receivable. At the end of December it amounted to $5,644.18.

Q. And it is still owed?

A. Still due from Guam Frozen Products.

Q. Has it been paid since?

A. No; it should have been and could have been but it hasn't been paid.

Q. Who are the stockholders in Guam Frozen Products?

A. Mrs. Litch, Mrs. E. W. Litch, and I think Mr. Phelan is a stockholder. He can answer as to the rest better than I can. We have qualifying shares or directors.

Q. Who are the substantial owners?

A. American Pacific Dairy Products, Mrs. Litch and Dick R. Hevessy. He was manager of Luzon Stevedoring Company. How they divided that stock I don't know.

Q. When did Guam Frozen Products open their store? [125]

A. I would say just before September, 1954.

(Testimony of Edward Thompson.)

Q. Just before September? A. Yes, sir.

Q. If I am correct, your previous testimony was that it was in the month of September, 1954, that the Dairy Queen of Guam began to lose money, the first store?

A. I don't think there is any connection there.

Q. Just answer the question. A. Yes.

Q. Isn't it a fact that for every month since and including September, 1954, the original store has lost money, according to your records?

A. Yes.

Q. Isn't it also true that Guam Frozen Products opened a competing store?

A. That is right; yes, sir.

Q. Do you have any idea what the situation is for January, 1955?

A. Not too good. About the same. We can tell.

Q. When you opened the other store——

A. Well, that isn't the cause of it.

Q. But the fact is that when you opened the other store the sales went down?

A. Yes; we had two drops in sales. We had a drop last spring, too. [126]

Q. This is the first month that the Dairy Queen of Guam ever lost money?

A. That is correct.

Q. But the sign, "Dairy Queen," is also on the other store? A. That is right, yes.

Q. Is there any distinction between the two stores so that the public knows one by one operator and one by another? A. No, sir.

(Testimony of Edward Thompson.)

Q. Is the equipment the same?

A. That is right.

Q. The format and appearance is the same?

A. Yes.

Q. And the sign the same?

A. That is right.

Q. Who is manager of Guam Frozen Products?

A. Norman Thompson.

Q. How much is he paid for that?

A. $100.

Q. And as manager of the old store, how much is he paid? A. $500.

Q. So he is paid $500 from the old store and $100 for the other? A. Yes.

Q. Where does the new corporate store get supplies?

A. From the American Pacific Dairy [127] Products.

Q. Are they billed through the account here in Guam? A. Yes.

Q. So it is fair to say they get all their supplies from what was formerly known as the Dairy Queen of Guam?

A. They get them from the same outfit here, yes. I wouldn't think that is quite the statement.

Q. Tell me how it works.

A. American Pacific Dairy Products has a warehouse. They buy the goods, put them in the warehouse and charge to each store the supplies that are issued, but because American Pacific warehouse considers the old store 100 per cent, we don't have

(Testimony of Edward Thompson.)

an accounts receivable for them. We just charge it in the books as a debit.

The Court: Would you care to advise counsel at this time why five times as much money is charged to the Dairy Queen operation as to the new operation?

A. Because in the agreement with Joe Siciliano we had the same agreement. He was to get $600 a month for the first store and less for any additional stores because the additional stores do not require so much to handle. He was to get $600 for the first store and then $100 or $200 for each additional store we opened.

The Court: Your contention is that Norman stepped into the shoes of Joseph Siciliano?

A. We followed the same pattern but at a lesser rate. [128]

The Court: In actuality does he only devote one-sixth of his time to the new store?

A. I wouldn't say that, your Honor, but, for instance, in ordering supplies it requires a certain amount of time anyhow and he can order for both stores at the same time; he can instruct the boys at the same time. It is a pattern that is followed elsewhere. In Seattle we have put in a manager for more than one store.

The Court: In Seattle you have a common ownership?

A. That is true.

The Court: Here you have a separate corporation and the separate corporation gets the benefit

(Testimony of Edward Thompson.)

of the services for which it is not paying proportionately?

A. We don't think so, your Honor.

The Court: Why not if it gets an equal portion of Norman's services?

A. Norman spends most of his time at the old store. He is there most of the time. We made that deal with Mrs. Litch and Mr. Hevessy because we had made the same sort of a deal with Mr. Siciliano, and at the time I made the deal it didn't occur to me that they were separate corporations or separate interests.

The Court: Have either Mrs. Litch or Mr. Hevessy participated in the management of the second store?

A. No, sir. [129]

The Court: Then why do you contend that Mr. Siciliano isn't entitled to participation on the same basis in the second store? You have denied Mr. Siciliano the right to participate in the profits?

A. That is right; yes, sir.

The Court: You just said you have Mrs. Litch and Mr. Hevessy in the second store?

A. We organized the corporation and they bought stock in it.

The Court: You have the use of their money?

A. Yes.

The Court: And you had the use of Mr. Siciliano's money?

A. Yes.

Q. What is the distinction? I am trying to be

(Testimony of Edward Thompson.)

fair about this thing. Why do you think Mr. Siciliano should be out and Mrs. Litch and Mr. Hevessy in and charged against the benefits of the store that Mr. Siciliano's money helped to create?

A. At the time I went into it with Mrs. Litch and Mr. Hevessy, Mrs. Litch was the wife of the commanding officer of Guam. We thought that might be worth something. She had the Helping Hands of Guam and we thought it would help us and Mr. Hevessy, manager of Luzon Stevedoring Company, suggested he could help. Mrs. Litch was transferred from the island last spring and Mr. Hevessy left the island last spring and that [130] ended that. The advantage we thought we were getting practically disappeared. Mrs. Litch and Mr. Hevessy did not have a partnership agreement. They bought stock in a corporation just like the stockholders in our corporation.

The Court: Proceed.

Q. (By Mr. Bohn): Mr. Thompson, when was the first time you met Mr. Siciliano?

A. In February, 1951, some time between the 4th and 8th of February, 1951, the day I first landed on Guam.

Q. When was the first time you communicated with Mr. Siciliano? A. Before that date.

Q. About when would that be?

A. It might have been as early as December, '50; I don't know.

Q. Could it have been as early as September, 1950?

(Testimony of Edward Thompson.)

A. If I mentioned having met Mr. Way, it might have been that early, yes. Mr. Way was the one who suggested I contact Mr. Siciliano.

Q. Who was Mr. Way?

A. He told me in Seattle he was the resident engineer of Pacific Island Engineers. He lived here for three years and he spoke very highly of Mr. Siciliano.

Q. So some time thereabouts in 1950 you communicated with Mr. Siciliano? [131]

A. I probably did; I don't remember now.

Q. Did you ask him for any help in getting a store opened on Guam?

A. I don't know. You suggested I did so I am not denying it.

Q. I show you what purports to be a copy of a cablegram dated September 19, 1950, as soon as your counsel has had an opportunity to glance at it, and I will ask you if you sent that cablegram?

A. I haven't the slightest recollection but I think I must have sent it; my name is on it.

Q. I will read you the cablegram. It is directed to Pacific Enterprises and is dated September 19, 1950, and reads as follows: "Relet Way you authorized to apply for license ice cream and reconstituted milk behalf American Pacific Dairy Products, Inc. Letter follows."

A. I don't remember but my name is one it and the reference to a man by the name of Mr. Way, I probably did. Perhaps it was sent by Mr. Little; I don't know.

(Testimony of Edward Thompson.)

Q. Did you, late in 1950, authorize Mr. Siciliano to apply for a license for your corporation for the sale of various types of dairy products on Guam?

A. I don't remember.

Q. Well, is it possible that you did?

A. It is possible, yes. [132]

Q. Do you know whether in fact Mr. Siciliano did make such application?

A. I don't remember. I don't know that he did, no, to tell you the truth.

Q. Did you ever in late 1950 or early 1951 direct a letter to Mr. J. J. O'Connor, Director of Commerce of the Government of Guam, with respect to becoming licensed on Guam to sell dairy products?

A. I did, yes; I remember that, yes.

Q. Isn't it a fact that prior to that time you had communicated with Mr. Siciliano and asked him to be of assistance to you in that matter?

A. I possibly did; I don't remember. I am not denying it; it is entirely probable.

Q. Did you start trying to get organized and operating in Guam as early as late 1950?

A. I hadn't been over here by then but we were laying the ground work, yes.

Q. You were getting started? A. Yes.

Q. Did Mr. Siciliano render any services to you in helping you get started on Guam?

A. I don't think he did, no, because I think I made the application myself when I came over here.

Q. About when would that be? [133]

(Testimony of Edward Thompson.)

A. Early February, 1951. I don't mean Mr. Siciliano didn't help me. He was very helpful. He drove me around, introduced me to people, things like that.

Q. As a matter of fact, wasn't Mr. Siciliano appointed your resident agent on Guam in February, 1951? A. I think he was, yes.

Q. Did he look for property for you to lease?

A. He did, yes.

Q. Did he communicate with you about it?

A. Yes.

Q. And did your correspondence with Mr. Siciliano, starting in 1950, continue right on to June, '52?

A. The correspondence did but the relation ceased in May when he wrote me—let me go back a moment. When I came over in February, 1951, I had never seen Mr. Siciliano. I met him the morning I landed and we introduced ourselves. He took me up to see the Governor. The Governor was the only one I knew on Guam. He took me in to see Mr. Guerrero, Land Commissioner, and Mr. O'Connor and others and he wanted 50 per cent of the deal when we discussed it and I told him we couldn't give him 50 per cent of the deal. I offered him 20 and when he still wanted 50 I explained to him that none of us had that much. It would have made him the largest stockholder of them all. I don't think he said he would take 20 but I left here thinking he was going to buy stock like the rest of us. On May 12 I heard from [134] him and he had been thinking it over and he was no longer interested in

(Testimony of Edward Thompson.)

the deal unless it was a 50 per cent deal but he would be glad to help me in any way. I asked him to contact Slaughter or I contacted Slaughter by letter. I don't know whether Mr. Siciliano contacted Slaughter or not even though he had offered to do anything he could to help.

Q. He was never compensated for that assistance?

A. It was just friendliness; at least I thought it was.

Q. He has never presented you with a bill?

A. Oh, no.

Q. But he did start as managing agent for you on Guam? A. He never filed it.

Q. Let me ask you, if you please, if that reads Jose D. Leon Guerrero, notary public?

A. Well, I didn't know he had filed it.

Mr. Phelan: Well, I don't see how this witness can be asked to verify Joe Guerrero's signature.

Mr. Bohn: I didn't ask him to verify it. What was the answer?

The Court: He answered that he didn't know he had filed it.

Q. (By Mr. Bohn): Was he authorized in 1951 to act as your agent? A. He was, yes, sir.

Q. Did he look for land for you and write to you about it? [135] A. He did.

Q. Did he suggest to you perhaps that Mr. Slaughter might be interested in this transaction?

A. I think that suggestion came from a man in Honolulu. I think I asked him to sound out Slaugh-

(Testimony of Edward Thompson.)

ter and see if he was interested. He offered to do what he could to help.

Q. He wanted 50 per cent of the deal and you were not willing to give him a 50 per cent deal at that time?

A. Mr. Siciliano had withdrawn from the picture in May; May 12, 1951, he wrote me and said: "After thinking it over I don't want any deal unless it is 50 per cent so, therefore, you had better count me out and make other arrangements." We were friendly and he knew what was going on.

Q. Throughout all this period?

A. Yes; there was no attempt to conceal from one or the other.

Q. When the deal with Slaughter fell through you wrote to him and asked him for help again?

A. In January, 1952, I wrote him and told him I wasn't happy with Slaughter's handling of the job. I didn't know Slaughter was in the States at that time, and I asked him if he was still interested in 50 per cent and he wrote he was always interested in a good deal and what were my commitments to Slaughter and all like that.

Q. And it was at that time the negotiations started? [136]

A. No, sir; the negotiations started when I came on the island. Later on Slaughter was doing a better job and I thought we would stick with Slaughter but he was going to Ethiopia.

Q. Wasn't it January, 1952, you just testified

(Testimony of Edward Thompson.)

you wrote to Siciliano and said, in effect: "Would you be interested in a 50-50 deal?"

A. Yes. Have you got the letter?

Q. I will show you a copy of that letter and ask you to read it.

A. This is January 24, 1952, addressed to Mr. Joseph Siciliano——

Q. It isn't necessary to read it out loud. I would just like you to verify it.

A. Yes; I still think he is one of the ablest men I know.

Q. I will refrain from commenting on how you have treated one of the ablest men you know.

A. Well, he didn't live up to his agreement.

The Court: I want the record to show Mr. Thompson's statement to the effect that the plaintiff in this case is "one of the ablest men I know" and that applies today?

A. Yes; maybe my acquaintance is limited but I think he has great initiative and ability.

The Court: Very well, the court will take a 15-minute recess at this time.

(The court recessed at 3:10 p.m., February 14, 1955, and [137] reconvened at 3:25, February 14, 1955.)

Mr. Bohn: May I proceed, your Honor?

The Court: Yes; please proceed.

Mr. Bohn: Will you read the last answer?

(The reporter complied with the request.)

(Testimony of Edward Thompson.)

Q. (By Mr. Bohn): You testified, Mr. Thompson, in January, 1952, you wrote saying in substance that you were dissatisfied with your agreement with Slaughter, the way things were going, and you at that time offered Siciliano a 50-50 deal, is that correct?

A. No; I asked him if he would be interested in a 50-50 deal or words to that effect and told him I thought it would be advantageous to both of us.

Q. You asked him if he would be interested in a 50-50 deal and what was his answer?

A. He wrote back and said he was always interested in a good deal but there were some things he would like to know. First, he asked me what my commitments were to Slaughter and some other questions I have forgotten and I presume I answered that letter.

Q. Did you, subsequent to his response—did you then come out to Guam and make a deal with Mr. Siciliano?

A. I came out to Guam in June, '52, and we signed that agreement.

Q. That we have been discussing, is that right?

A. Yes, sir. [138]

Mr. Bohn: Is it stipulated, Mr. Phelan, that all those agreements were executed by Mr. Thompson or do you want me to ask him about each one of them?

Mr. Phelan: Just have him identify his signature.

Mr. Bohn: May I see those agreements, please?

(Testimony of Edward Thompson.)

Q. (By Mr. Bohn): First, I will show you Plaintiff's Exhibit 1 which purports to be a certified copy of a resolution adopted by the American Pacific Dairy Products at a meeting held on March 2, 1951, appointing Mr. Joseph Siciliano managing resident agent of Guam for the corporation and ask you if that, in fact, occurred on that date?

A. On March 2, 1951? That is about the time I returned to Seattle then.

Q. And this is the official appointment of him as managing agent? A. Yes, sir.

Q. I show you Plaintiff's Exhibit No. 2, which purports to be a copy of articles of co-partnership and has been identified as such by Mr. Siciliano and ask you if that is your signature on that agreement?

A. Yes; that is mine.

Q. I will show you Plaintiff's Exhibit No. 3, which purports to be a copy of a supplemental agreement to the one just identified, and ask you if that is your signature on that agreement? [139]

A. That is right; it's there in three places.

Q. As you point out in answer to my question, it is there in three places? A. That is right.

Q. The first place you signed as president of American Pacific Dairy Products, in fact in two places you sign as president of American Pacific Dairy Products and then there is contained the language, "I agree to individually be bound by the foregoing agreement," and then there is the date, June 23, 1952, and then your signature again, "Edward Thompson," as an individual? A. Yes.

(Testimony of Edward Thompson.)

Q. You also agreed to be bound as an individual also? A. Yes.

Q. And I show you Plaintiff's Exhibit No. 4, which purports to be an assignment of lease of real property, and ask you if that is your signature on that document? A. That's mine; yes, sir.

Q. I call your attention to these signatures, Mr. Thompson—here again you have signed twice, is that correct?

A. I don't know; yes, I might have.

Q. Perhaps as I ask the questions it may appear why the first signature is American Pacific Dairy Products, Inc., by Edward Thompson, president?

A. That is right, yes. [140]

Q. And underneath is the typed word "assignor," meaning the person who is going to transfer the lease. The second signature reads as follows: "Dairy Queen of Guam by Joseph Siciliano, general co-partner," and "American Pacific Dairy Products, Inc., by Edward Thompson, general co-partner"?

A. Oh, I can see why I signed twice, yes.

Q. You signed once as president of American Pacific Dairy Products as assignor and once as a partner in Dairy Queen? A. Yes.

Mr. Phelan: Didn't he sign on behalf of American Pacific and not as an individual?

A. Yes; general co-partner, assignor.

Mr. Phelan: He signed in both cases as president of the corporation?

A. Yes.

(Testimony of Edward Thompson.)

Mr. Bohn: Yes; in one case as assignor and the other case as corporate partner, the person who signed as corporate partner. May I have the partnership agreement again? I will request the permission of the court to return to a previous document, Plaintiff's Exhibit No. 3. I would like to ask one or two more questions as to those signatures. May I proceed, your Honor?

The Court: You may proceed.

Q. (By Mr. Bohn): You stated awhile ago that you had signed this particular document three times. This is an [141] agreement between American Pacific Dairy Products, Inc., a corporation duly organized under the laws of the State of Washington, hereinafter referred to as American Pacific, party of the first part, and American Pacific Dairy Products, Inc., and Joseph Siciliano, co-partners, doing business in the Territory of Guam under the fictitious name and style of Dairy Queen of Guam, hereinafter referred to as Dairy Queen, parties of the second part, and in the signature on the last page, I repeat myself, you signed it three times—first as president of American Pacific Dairy Products, Inc., party of the first part; secondly, American Pacific Dairy Products, Inc., by Edward Thompson, president, and Joseph Siciliano, and there appears under that the cumulative reference, "parties of the second part."

Mr. Phelan: What is the date?

Mr. Bohn: This is the agreement dated June 23,

(Testimony of Edward Thompson.)

1952, containing certain information supplementing the partnership agreement.

Mr. Thompson: Isn't it in connection with Okinawa?

Mr. Bohn: It contains the information that "American Pacific hereby sells, transfers and assigns unto the parties of the second part all of the assets of the Dairy Queen store which it has constructed on Guam, including the building, stock in trade, furniture, fixtures, and supplies" and other matters and the party of the second part, that is the partners, acknowledge [142] they have received these items and also they have received the lease and there is certain information, in fact, that there is due to American Pacific from Dairy Queen the sum of $8,000 and some on capitalization and also covers a reference to Okinawa.

Q. (By Mr. Bohn): Mr. Thompson, on or about June 21, 1952, did you join in a letter to—I am sorry—I will return these other exhibits. May I withdraw that question? One more document I would like to have you identify—Plaintiff's Exhibit No. 5 purports to be a certificate of a co-partnership transacting business under a fictitious name. I ask you if that is your signature?

A. Yes; that is my signature.

Q. And this contains the following statement: "We, the undersigned, certify that we are partners transacting a wholesale and retail ice cream, snack bar and dairy products business on Lots No. 1413, 1413-1, and 1414, Agana, Guam, under the fictitious

(Testimony of Edward Thompson.)

name: Dairy Queen of Guam. The names of all the members of said co-partnership and their respective addresses are as follows, to wit: Joseph Siciliano, Maite, Barrigada, Guam, and American Pacific Dairy Products, Inc., Seattle, Washington," signed by Joseph Siciliano and by Edward Thompson, president of American Pacific Dairy Products, Inc., of Seattle, Washington, is that correct?

A. That is my signature, yes, sir.

Q. Did you on or about June 21, 1952, join in a letter [143] with Mr. Siciliano directed to Major H. W. Grossman, Post Exchange Office, Anderson Air Force Base? A. We did, yes.

Q. Did you in that letter state to Major Grossman that you were making a proposition to him about operating a dairy business on the field and did you state that this organization will be a co-partnership composed of Joseph Siciliano and Edward Thompson with, perhaps, several other partners, but in any event all of the majority interest would be Joseph Siciliano's and Edward Thompson's? A. Yes, I did.

Q. You go on to state that if there is something on Anderson Air Base other partners might come in? A. That is right.

Q. But you represented to Major Grossman that this was going to be a partnership?

A. That is right, yes.

Mr. Bohn: I think I have no further questions of this witness.

No. 14805

United States
Court of Appeals
for the Ninth Circuit.

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Appellant,

vs.

JOSEPH A. SICILIANO,

Appellee.

JOSEPH A. SICILIANO,

Appellant,

vs.

AMERICAN PACIFIC DAIRY PRODUCTS, INC., a Corporation,

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(Testimony of Edward Thompson.)

Cross-Examination

By Mr. Phelan:

Q. I think there are several things that were left hanging in the air. First of all, Mr. Thompson, you were testifying about those reports. What reports were made under the control of American Pacific Dairy Products? [144]

A. Those after Norman Thompson got here.

Q. From April, '53?

A. From May, '53, say.

Q. Now, the other reports prior to that were the ones that were in the records made by Mr. Diza?

A. They were compiled from the records made by Mr. Diza, but Norman compiled some of them from the records.

Q. From the available records? A. Yes.

Q. Now, what you have been giving today has been the figures on those reports? A. Oh, yes.

Q. Now, there was a list of checks you were asked about, some drawn to American Pacific Dairy Products. Do you know what those checks were for, drawn to the corporation?

A. Well, there was one check for $7,500 which was the payment of a loan but the greater part of them were for supplies that I had been asked to buy for the company.

Q. Do the books show the amount of supplies you bought for the company?

A. I made a report to Henry and later on to Norman every month.

(Testimony of Edward Thompson.)

Q. Do you have those reports?

A. Yes; I made a report every month of the money I received and the invoices I paid. [145]

Q. I would like to know—over $100,000 you testified went to the States. I would like to know where it went when it got there?

A. Oh, all of it went to pay legitimate bills for supplies. Well, that $7,500 was legitimate, too. That was money loaned to the corporation.

Q. At the time you formed the business?

A. At the time we formed the partnership, yes, out of the $15,000. I think he paid $7,500 to the bank account here and he gave me a check for $7,500, which I sent to the corporation.

Q. Now, the balance of the funds that were drawn to the corporation can you tell us what those checks were for?

A. Most of the checks were drawn to me. When we first started I was doing all the buying and paying the bills. It took some time to get the money over here and sometimes I was out $5,000 or $6,000. Later he would send me 5 or $6,000 in round figures and——

Q. Have you got complete records of that?

A. Yes.

Q. The supporting vouchers, too?

A. Oh, yes; they were in duplicate. I kept one and Henry Diza got the other one.

Q. For every purchase you made in the States you sent Mr. Diza an invoice?

(Testimony of Edward Thompson.)

A. Oh, yes, and bills of lading and, of course, he checked [146] when the stuff came in.

Q. Now, of that money that went to the States, did you retain any of it personally?

A. No, sir; unless once in awhile I might spend $5.00 or $10.00 and I would make a petty cash voucher and send that. I know I have done that once or twice.

Q. The petty cash was for the Dairy Queen?

A. Yes, for long-distance telephone, air mail, parcel postage and things like that.

Q. Now, the money that went to the corporation outside of the purchase price of $15,000—what did the rest of the money that went to the corporation represent?

A. Oh, to pay for supplies. If I had the money in my personal bank account I would pay it out of my personal bank account because it was easier than going out and getting signatures, so I would take the company's funds and pay for it but they would always be reimbursed.

Q. So all were reimbursed from Dairy Queen?

A. Not all for Dairy Queen. We spent some money for this new store.

Q. But there was the reimbursement for the money spent?

A. No; freight—I paid freight bills. Freight bills were always prepaid, but I would always pay the freight bills and I would send a charge for the shipping company for the freight bills. [147]

Q. Now, you have complete records—that is the

(Testimony of Edward Thompson.)

corporation has complete records of the transactions from the date Norman Thompson took over?

A. Yes.

Q. And supporting vouchers? A. Oh, yes.

Q. What kind of records has the corporation got for the period before Norman Thompson took over?

A. Well, we didn't go into that very thoroughly. Most of the payments were in cash and it would be very difficult to dig into, so we just accepted the figures and went on from there. We've got these records here. You mean invoices and stuff like that?

Q. Invoices, yes.

A. Yes; there wouldn't be many of those. Most of the things were bought in the States—the big items. A few small items would be bought around town but we didn't pay much attention. We didn't attempt to verify any of those.

Q. So that those reports for the first period you accepted the figures that Mr. Diza put on them but from the time Norman Thompson took over you have all the supporting documents?

A. I have supporting documents of those things I paid for, too. Yes, we have supporting documents now.

Q. At the time—sometimes you advanced your own funds [148] and were reimbursed?

A. Yes.

Q. Does anybody draw a salary from American Pacific Dairy Products? A. Norman does.

Q. Does anybody else?

A. None of the officers. Is that what you mean?

(Testimony of Edward Thompson.)

Q. Outside of the people working out here nobody does? A. Nobody draws any salary.

Q. Now, this profit figure that you were discussing is a computed profit based upon what records were available?

A. It was based—we just used the reports we had.

Q. You used Henry Diza's reports and based upon that you computed your profit?

A. We started from there, yes.

Q. And then from the time Norman took over——

A. We used actual sales and actual expenses.

Q. You haven't got the figures readily available by fiscal-year periods?

A. No, I haven't here, no.

Mr. Phelan: At this time I have no further questions.

Redirect Examination

By Mr. Bohn:

Q. You say you have complete records for the period of time since Norman Thompson took [149] over? A. Yes; we have those records.

Q. Where are they? A. Here.

Q. Completely here? A. Yes.

Q. Invoices and everything else?

A. They are not here, no. We didn't bring down invoices and things like that.

Q. You have them in Guam?

A. Yes; bills of lading, receiving tickets and things like that.

(Testimony of Edward Thompson.)

Q. Do you have a general ledger?

A. Yes; this book.

Q. When does that ledger start?

A. June, 1953.

Q. Where are all the ledger sheets prior to July, '53? A. I don't know.

Q. Were they turned over to you?

A. No, sir.

Q. Were they turned over to Norman Thompson? A. I think so.

Q. Do you know where they are?

A. No, sir; we have looked for them but we haven't been able to find them.

Mr. Bohn: I have no further questions. [150]

Examination

By the Court:

Q. I am about to recapitulate here while Mr. Thompson is on the stand. Now, first, Mr. Thompson, you formed a corporation?

A. That is right, sir.

Q. And you had approximately $42,500 paid-in capital?

A. A little over $42,000—$42,750 paid in.

Q. Does the corporation owe any money at this time?

A. It might owe current bills, yes, but nothing much. Stuff in transit is even paid for.

Q. Now this capital was raised primarily to open up a store or stores in Guam, is that correct?

(Testimony of Edward Thompson.)

A. That is correct, sir.

Q. Have you ever paid a dividend?

A. No, sir.

Q. And you have paid no salaries except for managerial services?

A. None for officers or stockholders, no, sir.

Q. Now tell me what your assets are as of this time—the corporate assets?

A. I can give it to you approximately. I haven't it up to date.

Q. Well, what is your cash in bank?

A. Cash in bank right now would be about 8 or $9,000, I would say.

Q. On your corporate books, what do you carry the Dairy [151] Queen as being worth?

A. On the corporate books, including the investment in the other things, we have about $70,000. That includes cash in bank and everything, your Honor, inventories, buildings, office equipment, store equipment and prepaid expenses—it all runs about $70,000.

Q. Now, how many shares of stock did you get for your investment in Guam Frozen Products?

A. We got 1,750 shares at par value of $10 a share. That is included in the $70,000, which is a rough approximate figure.

Q. Out of 3,500?

A. Out of 2,500 we have 70 per cent of that.

Q. So that Mrs. Litch and Mr. Hevessy only own 25 per cent? A. 30 per cent.

Q. They own 750 shares which is 30 per cent.

(Testimony of Edward Thompson.)

Well, if you own 1,750—— A. Yes.

Q. You own 70 per cent of Guam Frozen Products and for that 70 per cent you put in roughly 22 or 23——

A. No, sir; we put in the balance as accounts receivable—$17,500 and Guam Frozen Products owes us around $5,000 on open account.

Q. Well, now, in round figures then at the present time you figure that the corporation is worth roughly $30,000 over and above its paid-in [152] capital? A. Yes; roughly, $30,000.

Q. Over and above its paid-in capital?

A. That is correct, yes. I may be a thousand off but that is close enough.

The Court: Do you have any questions, gentlemen. on that analysis?

Mr. Bohn: Just one on a point that your Honor was bringing up a moment ago about the total amount.

Reredirect Examination

By Mr. Bohn:

Q. You testified in response to a question from the court—you stated your original paid-in capital was $42,000? A. $42,000 plus, yes.

Q. It is a fact, is it not, you overspent on the building as a result of your deal with Siciliano? You admitted you had overspent and, therefore, the total capitalization at that time was reduced to $30,000?

Mr. Phelan: That doesn't make sense. You don't

(Testimony of Edward Thompson.)

reduce a corporation's capitalization. You are confusing a partnership here and investment in a building.

Mr. Bohn: Perhaps I am. I will put it another way.

Q. (By Mr. Bohn): Your paid-in capital was about $43,000? A. That is right, yes, sir.

Q. Now, as a result of negotiations and because the building cost more than it should have—isn't that right? [153] A. I am quite sure, yes.

Q. As a result of that when you made your deal with Siciliano, the partnership which consisted of all the assets of Dairy Queen had a capital of $30,000?

A. $38,000—we knocked off about $4,000.

Q. And the reason it was $38,000 was because $8,000 was owed in bills?

A. That is right, yes.

Q. So it represented $15,000 cash, $15,000 of Siciliano's cash he paid to you and $8,000 in bills? That was the capitalization of Dairy Queen when you started?

A. I don't know whether we owed $8,000 in bills.

Q. Anything over?

A. No; they owed that to us. The partnership was to pay us that $8,000.

Q. Who was to pay Overseas Construction?

A. The partnership was to pay that and charge us against the $8,000 due us.

(Testimony of Edward Thompson.)

Q. As you started out with your partnership agreement you had a capitalization of $38,000, whatever it is, which represents $15,000 of yours and $15,000 of Siciliano's and the balance was reflected in debts?

A. No; the balance is excess in value that was turned in and it was to come to us.

Q. But there was the $8,000 in debts? [154]

A. No; $8,000 debts to American Pacific.

Q. I am getting argumentative about the debt. I apologize to the court. Isn't it a fact that at the time you made this deal Dairy Queen of Guam owed Overseas Construction?

A. We owed Overseas Construction about $5,000. We might have owed other creditors; I don't know.

Q. So the real capitalization at that date was about $35,000? A. No, sir; $38,000.

Q. The partnership paid it to you and you paid the bills? A. Yes; same thing.

Q. In other words, the net worth was roughly $30,000? A. No; roughly $33,000.

Q. You started the Dairy Queen then under the partnership agreement with a net worth of roughly $33,000? A. That is right, yes.

Q. You stated the organization which you now call American Pacific Dairy Products spent for the benefit of Guam Frozen Products something over $23,000?

A. We did not reduce our books because of the excess of charge for the building. In doing business with Joe, Joe said, "You paid too much for the

(Testimony of Edward Thompson.)

building." I said, "I think so, too," so we cut it down for a meeting of the minds, your Honor, but we still made that money.

The Court: What you are saying is that the corporation [155] took a loss which it expected to make up out of profits?

A. But that figure of $70,000—that includes the $4,000 we were going to write off.

The Court: Now at the expense possibly of oversimplifying this, if the corporation and Mr. Siciliano had continued as a co-partnership at the present time the corporation would have made $15,000 and Mr. Siciliano would have made $15,000?

A. That is very close to the correct figures, your Honor.

The Court: That would be profit?

A. Yes; it is very close to that.

The Court: Now you say that your assets at the present time are roughly $80,000?

A. $70,000, your Honor.

The Court: Roughly, $70,000. Now, what do you carry on your books as liabilities?

A. We have very few liabilities.

The Court: What about that $15,000?

A. We have that $15,000 that is due to Siciliano.

The Court: You carry that on your books as a debt to him?

A. Yes, sir.

The Court: Have you ever tendered it to him?

A. We tried to do it but we had a court order on that preventing paying Mr. Siciliano. Then a

(Testimony of Edward Thompson.)

receiver's estate, I guess you call it estate, was set up but I find there was no [156] receiver and by stipulation of counsel there was no receiver appointed, was there?

Mr. Phelan: If it please the court, I was counsel in that case and there was a period when there was no receiver and there was a change in receiver and then for a period counsel were receivers, all the counsel were receivers and no one wanted to pick up any money because you just moved it from one bank to another.

The Court: Now assuming for purposes of argument only that Mr. Siciliano is entitled to his share of the profits and to a 50 per cent interest in the assets that resulted from that partnership, according to your own figures, if you were to buy him out tomorrow, you would have to pay him $35,000?

A. $30,000 I would say because part of that $70,000 represents the inflated cost of the building.

The Court: You are carrying that——

A. On our books it is carried at the original cost price.

The Court: Now you have already paid two years' income taxes?

A. Yes, sir.

The Court: I suppose you set that building up on a depreciation basis for about five years, didn't you?

A. No, sir; we set it up on a ten-year basis, I think.

(Testimony of Edward Thompson.)

The Court: Five and five, according to your lease?

A. Yes. [157]

The Court: So your depreciation is about ten per cent per year?

A. That is about what we are doing, yes.

The Court: And, of course, on your other assets you took depreciation?

A. But that is reflected in the profit, too.

The Court: So as of this date upon the hypothesis that I have advanced, Mr. Siciliano's interest would be $30,000?

A. I think that is about right.

Mr. Phelan: May I ask a question to clarify these figures? This other suit reflects a demand for approximately $13,000 or $14,000. Mr. Thompson, have you allowed for that in these net worth figures you have given?

A. We have allowed for some of it—about $4,000 of it.

Mr. Phelan: So it is possible that the total figure would be about $10,000 less?

A. There is the possibility that it would be changed by anything that might come up, yes.

The Court: You carry it as a debt of $10,000?

A. That might be paid as a result of this other claim—this Pacific Enterprises claim.

The Court: As I understand the testimony, there were some supplies purchased and other things and some services rendered?

A. Yes, there were. [158]

The Court: Very well. You may be excused at this time. Call your next witness.

Mr. Bohn: I have one suggestion to make to the court in connection with the previous discussion just concluded. It is our view that—we don't have proof because we don't have access to all the figures—it is our view that the profit on this business from the day it started until December 31, 1954, before the payment of taxes, was at least $60,000 profit alone from the operation of the business, in additional to whatever the business is now worth as an operating business with its assets.

The Court: Yes, we are merely getting at a hypothetical case at this time. You have no basis for that statement, though, in the accounts that you have or the records that you have received, do you?

Mr. Bohn: Yes, we do. To repeat a few of those figures—according to our records, as of May 31, 1953, there was already $31,000 made by that time, and there is the complete operation from May, '53, to December 31, '54, which is a year and a half, and they show various adjusted figures. In one case they say the profit is $26,000 and in another case they say a $16,000 profit figure. I think a complete audit would show as of the end of the second fiscal year, August 31, 1953, profit to be in the neighborhood of $32,000 and that would be before the payment of taxes. The profit figures are quite low for the next year, [159] $15,000 or $16,000. Even that would total close to $60,000. I am inclined to believe those profit figures. I shoudn't state this——

Mr. Phelan: For September, October, Novem-

ber and December and January they operated at a loss.

Mr. Bohn: That is right. May Mr. Siciliano remain through the questioning or do you wish to have him excluded in accordance with your order?

The Court: No, my order was by your stipulation all witnesses should be excluded except one witness for the plaintiff and one witness for the defense. Now you don't have that. I am speaking of having a witness constantly available to counsel to advise on the process.

Mr. Bohn: I misunderstood your Honor. I am sorry.

ERNESTO O. DIZA

called as a witness by the plaintiff, was duly sworn and testified as follows:

Direct Examination

By Mr. Bohn:

Q. What is your full name?

A. Ernesto O. Diza.

Q. And how do you spell that name?

A. E-r-n-e-s-t-o O. D-i-z-a.

Q. Where do you live, Mr. Diza?

A. On Guam, sir, or do you mean the Philippines? [160]

Q. Where do you live in Guam?

A. In Tamuning, sir.

Q. In Tamuning? A. That is right, sir.

Q. How long have you been on Guam, Mr. Diza?

(Testimony of Ernesto O. Diza.)

A. I arrived on Guam in July, '48.

Q. July, '48? A. Yes, sir.

Q. Have you made any trips off Guam since that time? A. I went home in March, 1953.

Q. You were gone how long?

A. Until April 9, 1953.

Q. Vacation? A. That is right, sir.

Q. And your home is where?

A. Santa Maria Tomas.

Q. In the Philippine Islands?

A. In the Philippine Islands.

Q. Now with the exception of that short period in 1953 have you been continuously in Guam all that time? A. I beg your pardon?

Q. Did you take more than one trip off Guam?

A. Just one trip.

Q. Where have you been employed during this period of time? [161]

A. In 1948 I was employed at Harmon Field Restaurant.

Q. Who operated that? A. Mr. Siciliano.

Q. He was a concessionaire? A. Yes.

Q. How long did you work out at Harmon Field?

A. I worked there from 1948 until 1950, sir. I don't remember very well.

Q. After you stopped working there where did you go? A. Pacific Enterprises.

Q. And are you presently working for Pacific Enterprises? A. Yes, sir, that is right, sir.

Q. That continues up to today?

(Testimony of Ernesto O. Diza.)

A. That is right.

Q. What are your duties at Pacific Enterprises?

A. Bookkeeping.

Q. Bookkeeper at the present? Calling your attention to the period of time June 22, 1952, to April, 1953, were you acting as accountant for Pacific Enterprises during that time?

A. That is right, sir.

Q. Did you also during that period as part of your duties keep the books of account for Dairy Queen of Guam?

A. Yes, sir, that is right, sir.

Q. When did you start those accounts for Dairy Queen?

A. I started posting June 22, '52. [162]

Q. Started posting? A. (Nods head.)

Q. Do you recall when you last posted those accounts? A. My last posting is April 17, '53.

Q. And at that time who took over the books?

A. Mr. Norman Thompson.

Q. Had he been working with you at Pacific Enterprises prior to the time he started posting?

A. Yes, he worked with me a couple of weeks.

Q. At Pacific Enterprises' office? A. Yes.

Q. And then he took the books from Pacific Enterprises, is that correct?

A. That is right, sir.

Q. Have you seen them since?

A. Well, he called me once and that is all I saw the books.

Q. But the books have not been in your posses-

(Testimony of Ernesto O. Diza.)

sion until today? A. No, sir.

Q. Did you keep a general ledger for the Dairy Queen? A. That is right, sir.

Q. Is this bound book the one in which you kept the ledger? A. That is right, sir.

Q. Will you look at that book and tell me what is the [163] first entry?

A. The first entry is supposed to be June, 1952, and not July as this book shows.

Q. Can you find the first entry, Mr. Diza?

A. No, I cannot find it, sir; that is what I am looking for now.

Q. Let me ask the question this way—is there any entry in those pages made by you?

A. Not at all, sir, but this is the cover of the book I used.

Q. But there are none made by you?

A. None at all, sir.

Q. Were there complete entries in the general ledger made by you prior to the time you turned it over to Mr. Norman Thompson?

A. That is right, sir.

Q. And you turned those complete entries over to him? A. That is right, sir.

Q. You also kept a cash book of cash entries?

A. That is right, sir.

Q. Is that the book I am now putting in front of you? A. Yes.

Q. Is that the one? A. (Nods head.)

Q. What is the first entry made by you in that cash book? [164]

(Testimony of Ernesto O. Diza.)

A. Daily sales report, sir.

Q. And what date? A. June 22, 1952.

Q. And what is the last entry made by you in that book?

A. The last entry on cash disbursements is January 16, 1953.

Q. January 16 and what is the last entry on cash income? A. Cash income is April 17, 1953.

Q. The last entry made by yourself?

A. That is right, sir.

Q. Now does that book contain cash entries for the months of April—will you take a look, please, and see—— A. That is right, sir.

Q. Are there some entries in May?

A. Yes.

Q. Those were not made by you, however?

A. No, sir.

Q. Are there any entries at all for June?

A. No entries here for June.

Q. The last entry is in May and when is the next one? This is June of '53?

A. No, there is no entry for June of 1953.

Q. What is the next entry after May of '53?

A. The income shows in August, 1953. [165]

Q. No entries for June or July, is that correct?

A. On July there is no entry.

Q. Neither June or July?

A. No entry for August, too.

Q. No entry for August either? A. No.

The Court: Do I understand this cash book rep-

(Testimony of Ernesto O. Diza.)

resents only cash taken in or does it represent expenditures?

A. Expenditures and cash taken in, sir.

Q. (By Mr. Bohn): And did you turn this cash book over to Mr. Norman Thompson with the rest of the books? A. That is right, sir.

Q. And were each one of your cash disbursements supported by vouchers?

A. That is right, sir.

Q. Did you turn all of the vouchers over to Mr. Norman Thompson? A. That is right, sir.

Q. Did you maintain a correspondence file for the Dairy Queen?

A. There was but I turned it over to Mr. Norman Thompson.

Q. You maintained a correspondence file until he took over, is that correct?

A. That is right, sir.

Q. Did that correspondence file contain copies of reports [166] that you mailed to Mr. Thompson?

A. That is right, sir.

Q. Did it contain also letters from Mr. Edward Thompson? A. That is right, sir.

Q. Did it contain copies of letters from you to him? A. That is right, too, sir.

Q. That complete correspondence file was turned over to Mr. Norman Thompson, is that correct?

A. That is correct, sir.

Q. Did you maintain any other records that were turned over to Mr. Norman Thompson?

(Testimony of Ernesto O. Diza.)

A. I turned over journal vouchers, correspondence and shipping documents.

Q. Shipping documents? A. Um huh.

Q. All of your vouchers?

A. Yes, all of the vouchers.

Q. Who handled the cash for the Dairy Queen during the period of time you were keeping the books? A. First is Madeline Dorsit.

Q. And how long did she handle the cash?

A. Well, I don't remember very well when she left the island.

Q. Would it have been approximately one or two months after Mr. Siciliano left? [167]

A. That's about right, sir.

Q. Well, now after she left the island who handled the cash?

A. She advised me—she instructed me to handle the cash and do the same procedure what she was doing.

Q. How was that actually done? Who gave you the money? A. Mr. Meggo.

Q. And what did you do with the money after you got it?

A. I counted the money and entered it in my cash book.

Q. What did you do with the money?

A. Put it in the safe, sir.

Q. Did you send any money to Mr. Thompson?

A. I sent some money, sir.

Q. Did you do that by going to the bank and buying a bank draft? A. That is right, sir.

(Testimony of Ernesto O. Diza.)

Q. Did you also deposit money in the Bank of America? A. That is right, too, sir.

Q. Did you mail checks to Mr. Edward Thompson at his request for his signature?

A. That is right, sir.

Q. And you maintained a complete record of those checks? A. That is right, sir.

Q. And you turned those canceled checks over to Norman Thompson at the same time you turned the other books over? [169]

A. No, I was not able to get the blank checks because I was not authorized to get any money, any statement from the bank, so therefore whoever took the statements from the Bank of America took the checks with his signature.

Q. You didn't get the monthly bank statements?

A. No, I didn't, sir.

Q. So you didn't have them in your possession?

A. No, sir.

Q. Did you supervise—withdraw that question. Did you make frequent trips to the Dairy Queen?

A. Not so frequent.

Q. About how often would you go down?

A. About three times a week.

Q. What would be the purpose of those trips?

A. Well, just check the sanitation, check the boys and see if they were working right.

Q. On the job? A. That is right.

Q. Did you communicate with Mr. Thompson during this period of time, send him reports and let him know how the business was going along?

(Testimony of Ernesto O. Diza.)

A. Yes, I sent him monthly statements, sir.

Q. You were not in the room, Mr. Diza, but earlier in the trial Mr. Thompson identified a series of monthly statements which he said had been received from you, and I am just going to [169] ask you to identify one or two of them and ask you if that is the form you sent them to the States in. Are you able to identify the ones you made?

A. Yes.

Q. Well, this particular statement happens to be dated November 30 and indicates a trial balance from June 22 to November 30, 1952, and I will ask you if you made this report to Mr. Thompson?

A. Yes, I made this report, sir.

Q. And this report as a matter of fact contains what purports to be your signature? Is that your signature? A. That's my signature.

Q. Just below where it says certified correct?

A. (Nods head.)

Q. This report contains a trial balance as of that date, a profit and loss statement, June 22 to November 30, 1952, a financial statement of assets and liabilities and a breakdown of disbursements and similar matters pertinent to the report. The report is also broken down indicating what was paid for wages, salaries, light and power, postage and various matters, is that correct?

A. That is correct, sir.

Q. Now is that similar to the monthly report you sent to Mr. Thompson each month?

A. That is right, sir. [170]

(Testimony of Ernesto O. Diza.)

Q. And did you send those reports for the whole time before the books were turned over to Norman Thompson?

A. I am not too sure about that, sir, whether I sent him all the monthly statements that I made.

Q. You would be able to state with exactitude if you had the correspondence file that you turned over to Norman Thompson?

Mr. Phelan: Well, I don't think that is pertinent in here—these comments and long discussions with the witness. I think the witness should testify to what he knows.

The Court: Well, I don't think it makes any difference.

Q. (By Mr. Bohn): I show you another report which is for the period June 22 to December 31, 1952. It appears to have your signature and I will ask you if this is the report you made up and sent?

A. Yes.

Q. This is your report?

A. That is my report, sir.

Q. And this report contains the same sort of material as the previous report just mentioned, is that correct? A. Yes, sir.

Q. And an inventory?

A. It also includes an inventory as of December 31, 1952.

Q. That is a complete inventory of goods on hand, is that correct?

A. That is correct, sir. [171]

(Testimony of Ernesto O. Diza.)

Q. There is attached to it also a letter dated February 16, 1953, directed to Mr. Thompson which bears your signature and generally reports on various matters, is that correct?

A. That is correct, sir.

Q. I show you another report covering the period June 22 to September 30, 1952, and ask you to examine that report and tell me whether that is a report you made up and sent to Mr. Thompson?

A. Yes, I made this statement.

Q. That report also contains similar information to the previous reports including inventory?

A. That is right, sir.

Q. I show you what purports to be another report for the period June 22 to October 31, 1952, which contains what purports to be your signature and I will ask you if you made that report and sent it to Mr. Thompson?

The Court: Is it necessary to go over every one of them?

Mr. Bohn: Perhaps not, your Honor. I am only seeking to prove——

The Court: You said you wanted to ask about one or two of them and you are now up to four or five.

Mr. Phelan: I have just one question. What are you trying to prove by these reports?

Mr. Bohn: The fact that they were made and sent to Mr. Thompson. That is all I am trying to prove. If you will [172] stipulate they were.

(Testimony of Ernesto O. Diza.)

The Court: Mr. Thompson said he accepted them as being correct.

Mr. Phelan: He did not state he got them monthly or on time. He said there were reports for every month.

The Court: He said he accepted the reports because it was so difficult to go in back of them. We have to assume they are correct.

Mr. Phelan: Well, he didn't testify that he got them monthly or on time.

The Court: What difference does it make?

Mr. Phelan: It might make a lot of difference.

The Court: He testified that he got them.

Mr. Phelan: Yes.

The Court: He testified that he accepted them as being correct.

Mr. Phelan: Yes, but I think it is material to our case as to whether or not they came when they were supposed to come or weeks late. I notice that the letter on the December 31 one was dated in February.

The Court: Well, we don't know about that, of course. Mr. Thompson testified that he got his checks and they were always late but he got them. I don't see what your point is. The question is was money taken in, was money paid out and has it been accounted for to the satisfaction of the corporation. [173] Now the Court isn't concerned with anything more than that.

Mr. Phelan: Well, there is another question in

(Testimony of Ernesto O. Diza.)

this case, sir, and that is management. We can't lose sight of that.

The Court: Well, you can take that up in connection with your defense.

Mr. Phelan: But I don't want something read into the record that will be contrary to what we will try to prove.

The Court: All he has testified to is these are his reports.

Mr. Bohn: In the interest of saving time, I will not proceed further with that line of questioning.

The Court: No, you have shown that they are his reports and they were accepted by Mr. Thompson and he accepted their validity. I don't know why you have to go further.

Mr. Bohn: I have no further questions of this witness.

Cross-Examination

By Mr. Phelan:

Q. Mr. Diza, you were the accountant for Pacific Enterprises during this period?

A. That is right, sir.

Q. What were your duties at Pacific Enterprises? A. I was the bookkeeper.

Q. Talk into the microphone.

A. Bookkeeper and office manager at the same time, sir.

Q. You were office manager? [174]

A. That is right, sir.

(Testimony of Ernesto O. Diza.)

Q. What were your duties in connection with the Dairy Queen of Guam?

A. I was also the bookkeeper for the Dairy Queen of Guam.

Q. Did you post all the books?

A. That is right, sir.

Q. Did you post them daily?

A. That is right, sir.

Q. When was the last date you posted an entry in them that you remember posting?

A. April 17, 1953, sir.

Q. That is the last day you remember?

A. That is right, sir.

Q. Now was that the day that the entry was made for or the day you made the entry?

A. That is the day I made the entry, sir.

Q. And on that date you had posted everything up to date in those books?

A. That is right, sir.

Q. Now how often did you go down to the Dairy Queen?

A. Not so often, sir, but I go there at least three times a week maybe.

Q. What time of day?

A. Well, about 4 o'clock in the day—sometimes nighttime. [175]

Q. What would you do when you were down there?

A. I would see that everything is all right, that we don't have anything needed. They ask me if

(Testimony of Ernesto O. Diza.)

they want anything—just to help the boys, help them clean the store.

Q. You helped them clean the store?

A. Yes.

Q. Who told you to go down there to do that?

A. Just my own free will, sir, to help the boys.

Q. Did you go down there on your off-duty time? A. That is right.

Q. So you went down there on your own to help your friends?

A. Not to help my friends but to help the Dairy Queen.

Q. Now how many entries did you make in the books on the average day?

A. Receipts, disbursements, I'd say then check the entries. About three items a day, sir.

Q. Three entries to post a day? A. Yea.

Q. How much time did you spend each day?

A. Each day only three entries will take you less than five minutes a day.

Q. So on the average your bookkeeping took you five minutes a day on the Dairy Queen?

A. No, half an hour checking everything.

Q. Now how did you handle the money at the Dairy Queen? [176]

A. Well, I counted the money when Mr. Meggo turned the cash in.

Q. When did he turn the cash in?

A. Every morning, sir.

Q. He turned it in once a day?

A. That is right, sir.

(Testimony of Ernesto O. Diza.)

Q. How did he turn it in to you?

A. In a bag, sir, money bag.

Q. Did he have cash register tapes with that?

A. No, readings, sir, not a tape.

Q. Did he turn in a reading every day?

A. Yes, a reading every day.

Q. What time of the day was the reading taken?

A. Well, sometimes at nighttime, sir.

Q. It was taken at night?

A. Because they close at night.

Q. It was taken in the evening?

A. No, after closing time.

Q. The reading was taken off the cash register when they closed? A. That is right, sir.

Q. And once a day the tape was turned in to you? A. That is right, sir.

Q. Did you make a cash bank up for the operation of the Dairy Queen change fund? [177]

A. That is right, sir.

Q. How much was that change fund?

A. Well, sometimes I think it's $100; sometimes $150.

Q. Who did you give that change fund to?

A. Mr. Meggo, sir.

Q. When would you give it to him?

A. When he would go to the store to change the bank.

Q. When would that be?

A. Well, every afternoon. He changed the bank in the morning and afternoon.

(Testimony of Ernesto O. Diza.)

Q. How many times did you take a reading of the tape?

A. Just one time, sir. He read the adding machine tape at night.

Q. Is there a counter on that machine?

A. No, sir, there is a reading.

Q. There is an indicator that gives you a reading? A. That is right, sir.

Q. Are you familiar with that machine? Do you know the use of that machine? A. Yes, sir.

Q. Can it be set back and does it continue operating?

A. You can clear it, sir, after the business.

Q. Was that cleared every day?

A. That is right, sir.

Q. Now did Mr. Meggo give you a count of the cash or did [178] you count the cash?

A. Well, I counted the cash in front of him, sir.

Q. In the morning? A. In the morning.

Q. What did you do with the cash then?

A. Well, I put it inside the safe, sir.

Q. Did you deposit the cash in the bank?

A. Not before because I am not authorized to sign checks so in order to have expenses I got to keep the cash and pay cash for the expenses.

Q. How long did you operate the business on a cash basis?

A. I cannot remember exactly but you can check it on the bank statements.

Q. Were there ever any deposits made in the bank? A. Yes, there were.

(Testimony of Ernesto O. Diza.)

Q. How do you know? Who made them?

A. I did, sir.

Q. How often did you make them?

A. Well, the bank book shows it, also how much.

Q. Do you remember?

A. No, I do not remember.

Q. Did you make them once a month?

A. I don't know.

Q. Did you make them once a week?

A. Perhaps two days' in one deposit. [179]

Q. You mean to say that you don't know whether you made them on a regular schedule?

A. Well, as I said the bank deposits show how I deposited the cash.

Q. Do you remember?

A. No, I don't remember exactly.

Q. Did you handle the cash of Pacific Enterprises? A. That is right, sir.

Q. Did you deposit it the same way?

A. Yes.

Q. Were you also operating the Pacific Enterprises the same way?

A. Well, when there was a receiver we cannot draw any cash from the bank so the only way we got to do is keep the cash for awhile and if we need the cash to pay some money, pay it, sir.

Q. When was the Pacific Enterprises under receivership?

A. Well, I don't know exactly, sir.

Q. Isn't it a fact that they never were?

A. I don't know exactly.

(Testimony of Ernesto O. Diza.)

Q. Mr. Diza, you were an officer of Pacific Enterprises, weren't you? A. I was, sir.

Q. What was your office?

A. In Tamuning, sir. [180]

Q. What is the title of your office?

A. Right now, sir, you mean?

Q. No, during this period of time '52, '53, weren't you an officer of Pacific Enterprises?

A. I was acting as vice president.

Q. And you don't know whether or not the corporation of which you were vice president was in receivership at this time?

A. Well, Mr. Turner was handling all those matters, sir. He was our secretary-treasurer.

Q. You don't remember actually about the banking at all? How many times did you buy bank drafts?

A. Well, I bought if Mr. Thompson—if I ordered mix from Mr. Thompson he would say "Send me money." Then I would buy a bank draft but I don't remember how often it is.

Q. After you had ordered something he told you how much it was going to cost?

A. That is right, sir.

Q. Did you purchase bank drafts without seeing the invoices? A. No, sir.

Q. Did you receive invoices?

A. Yes, sir, shipping documents I received.

Q. From who? A. From Mr. Thompson.

Q. For every time you bought a bank [181] draft? A. That is right, sir.

(Testimony of Ernesto O. Diza.)

Q. Now how often did you mail reports to Mr. Thompson?

A. Well, I sent him once a month a monthly statement.

Q. Did you mail one to him every month?

A. I am not too sure if I mail one every month to him.

Q. Did you ever mail them late?

A. I don't remember. My letter to him shows how often and on what date I sent them to him.

Q. Did you ever receive letters from Mr. Thompson complaining that he was not getting reports on time?

A. I cannot remember that, sir, if he is complaining about the delay of the statement.

Q. What authority did you have down at the Dairy Queen? A. Nothing, sir.

Q. You had no authority down there?

A. Yes, Mr. Siciliano instructed me to keep books and that is all I did.

Q. When did he instruct you to keep the books?

A. Before he left, sir.

Q. When was that?

A. It's a month or two.

Q. What did he tell you about the books?

A. Just to keep records and the books.

Q. You had no authority down there?

A. At the Dairy Queen, no, sir, I don't have any authority [182] at all.

Q. Did you have any authority in Pacific Enterprises? A. Yes, sir.

(Testimony of Ernesto O. Diza.)

Q. What authority did you have there?

A. Well, I am employed there, sir, so I sleep there and eat there.

Q. I don't think you understand what I mean. Did you give any orders at Pacific Enterprises?

A. No, sir.

Q. You could not? Yet you said a few minutes ago that you were vice president.

A. Well, there was the general manager who gave orders.

Q. Who was the general manager?

A. Wally Viet.

Q. What position did Mr. Meggo have?

A. Well, he is assistant manager.

Q. Were they over the officers of the corporation? A. What is that, sir?

Q. Were they superior to the officer of the corporation?

A. I don't think they are superior but they are the ones in charge of the business.

Q. Did you as an officer of the corporation have any control or authority over Mr. Meggo?

Mr. Bohn: Your Honor, I have not objected to this line of questioning but I think it is [183] immaterial.

The Court: Your objection will be sustained.

Q. (By Mr. Phelan): Did Mr. Viet have any authority down at Dairy Queen?

A. That I don't know also, sir.

Q. How often did you make any reports to Mr. Siciliano?

(Testimony of Ernesto O. Diza.)

A. I didn't make any reports at all, sir.

Q. How often did you get instructions from Mr. Siciliano?

A. He did not give me any instructions—just the daily routine and that is it.

Q. When he left his instructions to you were verbal?

A. That is right, sir. Our daily procedure—that was the only instruction he give to me.

Q. The same procedure that was used in Pacific Enterprises? A. That is right, sir.

Q. Now did you ever take inventories down at Dairy Queen?

A. I am not too sure about that, sir, but the storekeeper took the inventory.

Q. Did you ever verify the inventory?

A. That is right, sir.

Q. How?

A. By checking against the stock cards.

Q. You would check the inventory against the stock cards? A. The stock records.

Q. Now where was the merchandise that belonged to Dairy Queen kept? [184]

A. Pacific Enterprises warehouse, sir.

Q. Was it kept in a separate section of the warehouse?

A. That is right, sir—separate section but just one warehouse.

Q. Was that section screened off in any way?

A. No, sir.

(Testimony of Ernesto O. Diza.)

Q. You posted your books every day?

A. That is right, sir.

Q. All during this period and you then turned them over to Norman Thompson, did you?

A. That is right, sir.

Q. Did you get a receipt for what you turned over? A. No, sir.

Q. Did you get a record of what was turned over? A. No, sir.

Q. So you are not in a position to tell us what was in those records?

A. But I know in writing because Dairy Queen is just a part of the organization.

Q. You understood Dairy Queen was part of your organization?

A. No, but that is why I feel like helping the Dairy Queen like when I go there to help the boys clean the floor.

Q. What I am trying to figure out is this: You say you turned over a letter file?

A. That is right, sir. [185]

Q. Do you know what letters were in the file?

A. Correspondence between me and Mr. Thompson.

Q. Are you in a position to tell us how many letters were in the file? A. No, sir.

The Court: Since the file is in your possession I think you should direct your questions as to any specific letters you have reference to.

Mr. Phelan: I am trying to find out how many letters were turned over. He said he turned over——

(Testimony of Ernesto O. Diza.)

The Court: You know what you have got. If you have any questions about them, bring out what you have and then ask questions.

Mr. Phelan: I know what we have got today. I am trying to find out how he bases the statement that he turned over all the records. He has no receipt.

The Court: This man is a bookkeeper. He is not a student of the science of mnemonics, which is the science of memory. Obviously if you depend upon him to remember everything you would not need him as a bookkeeper. You do not expect any bookkeeper to tell you what is in the books. You expect the books to tell you. You do not expect him to tell you what is in the correspondence file; you expect the file to tell you and you've got it, according to him, so let's stop that line of questioning. It is just wasting the time of the court. [186]

Mr. Phelan: I have no further questions at this time.

Mr. Bohn: Just one clarifying question.

Redirect Examination

By Mr. Bohn:

Q. I thought I understood you to tell the court that your last entry of cash disbursements was in January and your last as to cash income was in April, is that correct? A. That is correct, sir.

Q. So that you did not post the books completely through April 17? A. That is so.

(Testimony of Ernesto O. Diza.)

Examination by the Court

Q. Ernesto, who told you to turn over the books to Mr. Thompson? A. Nothing, sir.

Q. Didn't anybody tell you to turn over the books to Mr. Thompson? Didn't you ask Mr. Turner or Mr. Viet whether you should turn them over?

A. Before Mr. Thompson come here Mr. Thompson told me that his son is going to run the business so I turned over the books to him.

Q. In other words, it was pursuant to Mr. Thompson's instructions that you turned over the books to Mr. Norman Thompson?

A. We turned over everything. [187]

Q. He instructed you to turn over the books?

A. That is right, sir.

Q. What did you turn over? Your cash books, your vouchers, files and everything you had in connection with Dairy Queen?

A. That is correct, sir.

Q. Now prior to the time you turned over the books, was the cash turned in to you each day?

A. That is right.

Q. And that cash was recorded in your cash book? A. That is right, sir.

Q. Who ordered the products for the Dairy Queen?

A. Mr. Meggo ordered through me and I write a letter to Mr. Thompson to send us supplies for Dairy Queen.

(Testimony of Ernesto O. Diza.)

Q. You wrote the letter?

A. That is right.

Q. And Mr. Thompson sent you the invoices?

A. That is right, sir.

Q. And you paid Mr. Thompson for it?

A. That is right, sir.

Q. Sometimes you paid him by checks which he signed? A. That is right, sir.

Q. Was Mr. Siciliano authorized to sign checks also? A. No, sir.

Q. Was Mr. Thompson the only one authorized to sign [188] checks for the local account?

A. I don't know who is authorized or not authorized to sign checks.

Q. But you sent him a made-out check without signature? A. That is right, sir.

Q. And on other occasions you sent him a bank draft? A. Once in awhile, sir.

Q. Why didn't you send him checks all the time? Why did you send checks sometimes and bank drafts other times?

A. The first time we sent him a sight draft.

Q. You opened a checking account afterward?

A. Mr. Thompson and Miss Dorsit opened the bank account. Then Mr. Thompson and Miss Dorsit went to the States so there is nobody authorized to sign checks.

Q. Who paid the gross receipts tax?

A. I do for Dairy Queen.

(Testimony of Ernesto O. Diza.)

Q. You paid the gross receipts tax monthly on the basis of your cash receipts?

A. That is right.

Q. And all of the books and everything else you turned over to Norman Thompson?

A. That is right, yes.

Q. Now there has been testimony here, Ernesto, that Pacific Enterprises or employees of Pacific Enterprises did certain work at the Dairy Queen, that a reefer truck owned by [189] Pacific Enterprises was used by the Dairy Queen, that the Pacific Enterprises furnished out of its stock certain items which were used by Dairy Queen. Now as the bookkeeper for both the Dairy Queen and Pacific Enterprises, did you make any payments to Pacific Enterprises for these services? A. No, sir.

Q. Did anyone ever tell you to set up on your books a charge against the Dairy Queen for those things that were furnished?

A. Not until last August, sir.

Q. In other words, from June of 1952, until August of 1954, nothing appeared on your books showing an obligation on the part of the Dairy Queen toward Pacific Enterprises, Inc.?

A. There is some, sir, but not the reefer truck and subsistence and housing facilities.

Q. Those were not? Who told you to put them on then?

A. Mr. Turner instructed me to charge so much housing and subsistence for the Dairy Queen.

Q. But this was after it had been furnished,

(Testimony of Ernesto O. Diza.)

wasn't it? A. Yes, that is right, sir.

Q. Did he tell you to date it back to the time it was furnished? A. That is right, sir.

Q. And to show on your books that it was dated somewhere between June of 1952, and April of 1953? [190] A. That is right, sir.

Q. So that you antedated these entries on your books?

A. Not on the books—we are talking about the housing, isn't that right?

Q. We are talking about the charges of Pacific Enterprises. A. Yes.

Q. So it was last August then that you went back and put these charges on the books of Pacific Enterprises?

A. No, it is not on Pacific Enterprises' books, sir.

Q. Well, you turned over the Dairy Queen books in April of '53? A. Yes, that is right.

Q. So you couldn't have put them on Dairy Queen books?

A. You mean the housing charges?

Q. Housing and reefer truck and supplies and so forth.

A. Well the supplies it's recorded daily, sir.

Q. But the housing, messing facilities and so forth you did not put those on Pacific Enterprises' books until August of 1954?

A. No, it is not on Pacific Enterprises' books.

Q. It isn't there today?

A. It is not there today.

(Testimony of Ernesto O. Diza.)

Q. In other words, as far as Pacific Enterprises, Inc., is concerned you have no charges on your books against Dairy Queen? [191]

A. There is some items, sir, but not subsistence, housing, supplies, and the warehouse—it is not charged against Pacific Enterprises' books.

The Court: Well, I find it extremely difficult to follow this.

Mr. Phelan: I can't figure it out except he said he hasn't got it in the books yet they filed a lawsuit and have their statements attached to it as exhibits to their complaint.

The Court: I am trying to trace down the transactions and according to this witness, the Dairy Queen has never been debited for other than supplies.

Mr. Bohn: May I address the court?

The Court: Please do, yes.

Mr. Bohn: It was not our understanding that the details of that transaction would be taken up in this case but perhaps a word of explanation would clarify the situation. Those items consist, of course, of several different types of services rendered. For example, the item of subsistence for housing the men at the Dairy Queen. They were entitled, in addition to their salary, to subsistence and housing. That subsistence and housing through this entire period was furnished to these men by Pacific Enterprises.

The Court: Well, if you intended to charge for it why didn't you set it up on your books?

(Testimony of Ernesto O. Diza.)

Mr. Bohn: I presume that the reason was because of the [192] close relationship. It was a matter that hadn't gotten settled out yet. I presume it would be a matter of mutual accounting between the parties at this time.

The Court: The parties are Pacific Enterprises, Inc., and the partnership. Pacific Enterprises, Inc., furnished services or supplies or something of value to the partnership. It seems to me that proper bookkeeping contemplated that a charge would have been made and payments made currently since you always showed a profit.

Mr. Bohn: I think it is impossible to disagree with that suggestion of the Court. I think proper bookkeeping on those items would and should be kept current. In mitigation I point out to the Court that here is a situation where there is an extremely close relationship between the owners of the Dairy Queen and Pacific Enterprises; that in my own view I respectfully suggest to the Court that it probably would have been more reprehensible for these to have been paid weekly or monthly because of the possible statement there was an adverse interest and various items had not been thoroughly agreed upon, for example the subsistence.

The Court: Mr. Bohn, don't you agree if you furnish and rely upon a profit and loss statement and you have a hidden charge then that statement does not reflect the true situation between the parties?

Mr. Bohn: I must concede that to be the case in

(Testimony of Ernesto O. Diza.)

the [193] absence of adjustments and mutual agreements at a later date.

The Court: In the absence of mutual agreements at a later date?

Mr. Bohn: Right.

The Court: You have heard the testimony here, for instance, that income taxes were paid on the basis of the amount shown as having been earned profit. Obviously if you have expenditures which are properly chargeable to the business, a serious matter would be raised for the simple reason that you would be paying more tax than was indicated by your true profit.

Mr. Phelan: If it please the Court, if I am not mistaken, Mr. Diza said that some of these items don't show on Pacific Enterprises' books even today.

The Court: That is my understanding. There is nothing set up on the books of the corporation for indebtedness except certain items of supplies. Items such as housing and the furnishing of a reefer truck today do not appear on the books.

Mr. Phelan: It would appear that they were an afterthought after the lawsuit was filed.

The Court: Well, our time is drawing to a close this evening and it isn't germane particularly to this action except, of course, we have to know how these transactions between the parties were handled in order to evaluate the type of service which Mr. Siciliano rendered in the way of management. If he did more than he was supposed to do we want to

(Testimony of Ernesto O. Diza.)

know that, but [194] I must confess that I find it a bit unusual for a large operation of that kind not to carry upon its books as an obligation due any amounts that he expected to claim as obligations due. Otherwise it distorts your profit and loss picture, I would think, materially.

Mr. Bohn: Well, I cannot successfully disagree with the Court on that point.

The Court: Yes, now are we through with this witness?

Mr. Bohn: I am, your Honor.

The Court: Are you through with him?

Mr. Phelan: Yes. I would like to know if there is any possibility of having this witness or somebody else bring in supporting vouchers for these things that don't show up on the books? I don't think it is necessary to go any further than Mr. Thompson's satisfaction with what he has received. I am talking about this subsistence, etc.

The Court: Well, of course, I realize that it isn't particularly germane to this particular case, but naturally since so much depended upon the method of bookkeeping, the Court made inquiry as to the inter-relationship because you have a corporation debtor, a corporation creditor, both books being kept by the same person. Obviously a very high standard of performance is required. This witness will be excused and the court will stand adjourned or recessed until 9:30 tomorrow morning.

(The court recessed at 5:05 p.m., February 14, 1955.) [195]

Tuesday, February 15, 1955, 9:30 A.M.

The Court: Call your next witness.

Mr. Bohn: I beg your Honor's pardon. May I at this time address an inquiry to the Court as to the suggestion of the Court as to when the second case should be presented to you?

The Court: Oh, I don't believe that we are dealing with the second case at the present time. The pretrial order in connection with the Pacific Enterprises' case merely states that any evidence which is introduced in this case and which is material to the second case should be considered in connection with the second case without having to be reintroduced. Now what we are trying here, of course, is the Siciliano vs. American Pacific Dairy Products, Inc., case and that involves, of course, as you know, the question as to whether the contract continues in existence and so forth and the basis for any accounting between the partners if that is true, so specifically I don't think you are required to present any testimony in connection with Pacific Enterprises, Inc., vs. American Pacific Dairy Products except as it bears upon the fulfillment of the partnership obligation by Mr. Siciliano.

Mr. Bohn: Well, Mr. Phelan has asked me the question as to when I should be prepared to start on Pacific Enterprises—at the conclusion of this case or some future time.

The Court: At the conclusion of this case. I think the pretrial order makes it abundantly clear that these are consolidated solely for the purpose

of utilizing the relevant testimony. [198] The pretrial order states the action is consolidated for purposes of a trial with 59-54 and anything pertinent in the present action shall be considered as having been introduced in 68-54.

Mr. Phelan: The reason for the question, your Honor, was that it was my understanding, I believe it was a previous suggestion by the Court, that in the event it should be found an accounting is necessary in the first action, it should become a part of the second action at the time of trial.

The Court: Until it should be determined what the situation is as regards this case, we are in no position to determine the obligations of the partnership to Pacific Enterprises.

Mr. Bohn: That was my understanding of your Honor's order. I would like permission at this time, if your Honor please, to recall Mr. Henry Diza for one purpose and one purpose only and that is to correct an error in his testimony in response to a question of the Court.

The Court: Very well.

Mr. Bohn: Mr. Diza.

The Court: This witness has already been sworn.

MR. *HENRY* DIZA

previously called as a witness by the plaintiff, was recalled by the plaintiff and, having been previously sworn, testified as follows: [199]

Reredirect Examination

By Mr. Bohn:

Q. In response to a question of the Court yesterday you stated you had not prepared and forwarded a bill or a list of obligations due Pacific Enterprises until August of '54. Do you desire to correct that statement at this time?

A. Yes, I submitted that statement August, '53, to Mr. Turner.

Q. August, 1953? A. Right, sir.

Q. It was not August, '54, but August, '53, is that correct? A. Yes, sir.

Mr. Bohn: I have no further questions.

Recross-Examination

By Mr. Phelan:

Q. Yesterday on the stand did you not tell the judge that as of yesterday you had not posted that to the books of Pacific Enterprises?

A. That is right; it is not posted.

Q. Have you got supporting vouchers in your files to support that statement?

A. Well the subsistence is only the estimated cost.

Q. Have you got vouchers for anything else?

A. We have supporting papers on materials we used on the addition to the building. [200]

(Testimony of Ernesto O. Diza.)

Q. What building are you referring to?

A. The addition—the extension.

Q. That was built with Pacific Enterprises' funds? A. That is right, sir.

Q. When was that built? A. Oh, 1952, sir.

Q. You were handling the funds of Dairy Queen at that time? A. That is right, sir.

Q. Was money in the bank at that time?

A. I think so, sir.

Q. You had cash in the safe?

A. That is right.

Mr. Phelan: I have no further questions.

Mr. Bohn: I have no further questions of this witness, your Honor.

The Court: Very well. You may step down.

Mr. Bohn: That constitutes the plaintiff's case, your Honor. We rest at this time.

Mr. Phelan: May it please the Court, I move that the complaint be dismissed on the grounds that the plaintiff has failed to prove that he complied with the terms of the contract. He was gone for two years. The contract called for his management. He was the general agent for the partnership. He got on an airplane and left a week after the business opened and did [201] not return for two years. He took no active part in the management of the business. He left that to the employees of a corporation, not a party to the contract, who happened to be on Guam, and I think the partnership agreement and other testimony is plain as it shows that his ability and his skill were part of the consideration.

The Court: What is your view, Mr. Phelan, as to your obligation to Mr. Siciliano? What do you owe?

Mr. Phelan: Whatever an accounting would show.

The Court: An accounting as of when?

Mr. Phelan: We contend that Mr. Siciliano repudiated that contract when he left, but the corporation went to great lengths to try to get him back. They wanted his services. They leaned over backward.

The Court: There is no evidence before me to that effect.

Mr. Phelan: Not as yet; I think you are right. His repudiation of the contract meant they had to return his money to him less any damages he might owe based on an accounting for that period.

The Court: Now it seems to be admitted—on a motion of this kind, of course, the Court must look on the plaintiff's testimony in its most favorable light. It seems to be admitted that from June of 1952, until April of 1953, the following services were performed which were beneficial to the copartnership: First, employees were provided. Secondly, warehousing for all [202] materials was provided. Thirdly, an extension to the building was constructed. Fourthly, a reefer truck was made available to carry the surplus mix when business was so great that the machines could not keep up currently; that there was constant supervision provided; that there was bookkeeping provided, and that the net result of all these was that the business

made a much larger profit while it was being handled on that basis than it made when it was being handled by the American Pacific Dairy Products.

Mr. Phelan: Yes, but where was Mr. Siciliano's personal supervision?

The Court: If this contract means that he is entitled to a salary only while he is employed, then if there is dissatisfaction the contract itself provides how the partnership shall be terminated.

Mr. Phelan: Yes, but——

The Court: Now we have no evidence here that you have done more than to accept the full benefits, took the profits and invested them elsewhere without the consent of Mr. Siciliano, and as you have ignored him completely——

Mr. Phelan: If the Court please——

The Court: When obviously you must have known where he was since you have just stated you attempted to get him back.

Mr. Phelan: Yes, but if a contract is entered into and ratified there are provisions for rescission, but if a contract [203] is repudiated by the other party, the non-repudiating party doesn't have to follow the terms.

The Court: Mr. Phelan, how can you construe repudiation when all the services of management were performed except they weren't performed by Mr. Siciliano but were performed by a corporation which he headed and of which the testimony shows he was the principal stockholder?

Mr. Phelan: The contract was not with that

corporation but it called for Mr. Siciliano to supervise.

The Court: Then why did you accept the services?

Mr. Phelan: Well, if the Court please, there was almost $50,000 invested. Something had to be done. You just don't leave it.

The Court: Guam is available by flight in two days. The testimony is that Mr. Siciliano left the first part of July, 1952. He testified that when he got to the States he telephoned and advised them that he would be gone, he said, for about two months but in the meantime everything would run all right. There was no repudiation on his part. The fact that you say "We tried to get him to come back" indicates that you did not consider it a repudiation.

Mr. Phelan: At that time, no.

The Court: That agreement was actually operative, at least until you took over.

Mr. Phelan: Well, I contend I think it shows good faith. [204] Siciliano got a problem. He went to the States. We tried to get him back—OK—it takes him months to decide he wasn't coming back.

The Court: I agree with you as to the good faith. I think one of the interesting things about this case here is that all of the witnesses who have testified appear to have testified with the utmost honesty and frankness and both the bad and the good things were brought out. Your witness has clearly testified that he thinks they were dealt honestly with. He

testified that he considered Mr. Siciliano one of the ablest men that he had ever known.

Mr. Phelan: That is why they wanted him.

The Court: He testified that he accepts the reports that were made to him as being valid and being about as good as could be done in the circumstances. The only odd thing that the Court finds is that the Dairy Queen starts to lose money just as quickly as this lawsuit is filed. The Dairy Queen made money every month until September, 1954, and then you show a loss and you show a loss since then.

Mr. Phelan: Most every business on Guam is not doing the business it did a year ago either.

The Court: Well, it is coincidence possibly but it is a strange coincidence and obviously the question presents itself as to whether money is being diverted from the profits of the Dairy Queen for the operation of the corporation which is under [205] joint management. I think very clearly that the plaintiff has made out a prima facie case. Now as to when the cut-off date is for purposes of accounting, I don't know, but the plaintiff has certainly shown that you have his money, that you took his services, that those services resulted in a greater profit than you made when it was under your sole management, and that at no time have you made a legal tender or have you followed the contract as to how it should be accounted for in any other way. If there has been arbitrary action, according to the testimony, so far that arbitrary action is on the part of the defendant, not on the part of the plaintiff.

Mr. Phelan: I don't think it is arbitrary to tell a man who is 6 or 7,000 miles away from where he has agreed to be, "We can't ratify it. We will give your money back." Mr. Siciliano knew he was dealing with the corporation.

The Court: Now, if you notice paragraph 7 of this contract, it simply says, "During the period that he shall act as manager of the co-partnership."

Mr. Phelan: Yes.

The Court: It doesn't say during all the time.

Mr. Phelan: Neither does it provide he shall act for seven days.

The Court: It merely provided for his salary during that time and "in the event either party should desire to retire from the partnership, he shall give the other party written notice of his intention so to do and the remaining partner shall have an [206] option for the ninety days next ensuing the receipt of such notice to elect to buy out said retiring partner and acquire sole ownership of the business of Dairy Queen of Guam in the following manner," which you set forth.

Mr. Phelan: Yes, that was the tentative contract that was entered into——

The Court: There is no evidence before the Court at this time that there is anything tentative about the contract. It is fully executed and supported by the assignment of a lease and registration of authority to do business under a fictitious name. You are not in the tentative field then. You are a going business.

Mr. Phelan: The cases I have read, your Honor,

MR. EDWARD THOMPSON

ously called as an adverse witness b the plain-
was called as a witness for the defndant and
g been previously sworn, testified asfollows:

Direct Examination

Mr. Phelan:

And you are Mr. Edward Thorpson who
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Mr. Thompson, yesterday you wee asked a
questions about Mr. Siciliano beingthe agent
Guam—I believe it was in 1951—ofAmerican
ific Dairy Products, Inc? A. Yes, sir.

You had some negotiations wit Mr. Si-
in 1951? [210]

Yes, I saw him in '51 on Guam.

He was appointed agent of the orporation

fter I was here on Guam in Febuary, '51,
ppointed agent, yes.

d those negotiations work out?

, Mr. Siciliano called them off in his letter
12, 1951. He called them off beause he
agree to accept what we had tooffer. He
nore and we offered less. He wated more
thought he should have and more than we

t that time the idea was that he would buy
the corporation?

es, we offered him a chance to bu up to 20
of the stock in the corporatio and he
it over and that didn't appeal to hm.

say that a party seeking to bind a corporation, the burden is on him to show his authority.

The Court: I think he has shown that whether it was a partnership or a joint venture nowhere here do we find any evidence that the corporation is not still willing to be bound by the agreement entered into. You have no evidence that it was ever repudiated.

Mr. Phelan: I don't think he has any evidence in to show that the corporation ever authorized his signature.

The Court: You have got the fact that the president of the corporation executed the contract. You have got the fact that the corporation made income tax returns. You have got the [207] fact that these matters were all of public record, public knowledge, and the fact that the corporation took the profits and now have them invested.

Mr. Phelan: Not as a partnership. Someone had to prepare the tax returns and they were not partnership tax returns.

The Court: Yes, you took the money.

Mr. Phelan: We admitted we took the money; we admit that.

The Court: And you have given nothing back. You mean to say you expect the Court to say you can keep a man's money, take his service—you can make a profit out of it and then you can kick him in the teeth just as soon as you feel that the thing is profit-making now and on its feet? You mean to say that for one moment if this thing had lost

money that Mr. Siciliano would have gotten his $15,000 back?

Mr. Phelan: Since it didn't I don't know.

The Court: Every nickel that you had—your paid-up capital was in this store. You were broke.

Mr. Phelan: That is not so, your Honor.

The Court: Well, that was the testimony—that unless you called upon the stockholders for additional capital contributions you had no surplus.

Mr. Phelan: True, but when this thing went into operation there was an additional $15,000 in there.

The Court: There was $38,000.

Mr. Phelan: There was more than that. [208]

The Court: Well, $8,000, I think, has to be paid back out of profits and each side puts in $15,000. Otherwise you are in no position, in the Court's view, to come into Court and say, under the testimony which has been introduced—what your defense may be, I don't know—but to say after you have received the money, after you have received these services, after you have taken the profits, after you have invested them in another corporation and so forth, that you have no obligation whatever.

Mr. Phelan: I haven't said that. We have always been ready to refund his money.

The Court: But the Court has no evidence before it that you have ever done anything affirmatively at all. You have not followed the agreement as to the winding up of the partnership voluntarily nor have you ever made a legal tender of the amounts due to the defendant.

Mr. Phelan: Our contention is since the partnership was never ratified by the corporation, it was in effect abandoned by Mr. Siciliano, and that the terms of the agreement for winding up are not binding.

The Court: Well, Mr. Phelan, you have a peculiar theory of abandonment. Where did your money come from? Where did your profits come from?

Mr. Phelan: I don't know.

The Court: Certainly not from an idle operation.

Mr. Phelan: That is true. [209]

The Court: Who ordered the materials? Who served the ice cream? Who furnished the reefer? Who furnished the supervision? Who furnished the bookkeeping? Who made the reports?

Mr. Phelan: It wasn't Mr. Siciliano.

The Court: Not individually but it was done and it was done by the employees of the corporation which he headed, which according to the testimony, was interchangeable with him. Proceed. Your motion is denied.

Mr. Phelan: Mr. Thompson. You have been previously sworn, Mr. Thompson?

Mr. Thompson: Yes.

MR. EDWARD THOMPSON

previously called as an adverse witness by the plaintiff, was called as a witness for the defendant and having been previously sworn, testified as follows:

Direct Examination

By Mr. Phelan:

Q. And you are Mr. Edward Thompson who previously testified? A. That is right.

Q. Mr. Thompson, yesterday you were asked a few questions about Mr. Siciliano being the agent on Guam—I believe it was in 1951—of American Pacific Dairy Products, Inc? A. Yes, sir.

Q. You had some negotiations with Mr. Siciliano in 1951? [210]

A. Yes, I saw him in '51 on Guam.

Q. He was appointed agent of the corporation here?

A. After I was here on Guam in February, '51, he was appointed agent, yes.

Q. Did those negotiations work out?

A. No, Mr. Siciliano called them off in his letter of May 12, 1951. He called them off because he couldn't agree to accept what we had to offer. He wanted more and we offered less. He wanted more than we thought he should have and more than we offered.

Q. At that time the idea was that he should buy stock in the corporation?

A. Yes, we offered him a chance to buy up to 20 per cent of the stock in the corporation and he thought it over and that didn't appeal to him.

(Testimony of Edward Thompson.)

Q. As an agent, then, he was terminated?

A. No, we didn't terminate that until I got over here in July. I mean terminate officially. No, we didn't do anything about it until July. In fact, I didn't know he actually filed that appointment with the Government of Guam because in his letter of April 7, he said, "I am holding all the papers you sent me."

Q. Then Mr. Slaughter was your next agent here?

A. Yes, Mr. Slaughter leased the land, entered into a contract for the construction of the building and was the manager [211] until I got here in June.

Q. That was June, '52? A. June, '52, yes.

Q. Now, when in June, '52, did you commence negotiating with Mr. Siciliano?

A. When I got here in June, Mr. Slaughter told me he was going to Ethiopa, and I saw Mr. Siciliano when I got here because he and I were friendly, and I don't know when we began negotiations—June 15, 16, or 17.

Q. Was that when you got to Guam?

A. No, I got to Guam the 10th of June, '52, approximately.

Q. When you got to Guam, what was the condition of the building?

A. The building was completed. The roof wasn't entirely satisfactory. There was a door on the inside that had to be put in. Slaughter thought it wasn't necessary but Tony Lujan, the contractor, put it in because it was shown on the blueprints,

(Testimony of Edward Thompson.)

and some of the painting on one side of the building looked like it had been put on with too thin paint, and that was corrected.

Q. Do you know who corrected that?

A. Tony Lujan of Overseas Construction.

Q. They had the contract?

A. They had the contract, yes.

Q. When were the machines installed? [212]

A. The machines were installed the first week I got here. Actually, a man named Griffith Thomas and an electrician did the installing. All I did was say, "do this," and "do that."

Q. When did Slaughter terminate his connection with this business?

A. I think we paid him up to the end of June. I don't know. He said he was going to Ethiopa, but he did help us. He had a crew. We had five men we used to open boxes and clean up the store, put the goods on the shelf and things like that, so I would say he was actually active until the 21st, maybe the 20th—I don't know—June, '52.

Q. Now, on the day the store opened for business, was there any remaining construction to be accomplished?

A. Well, we didn't know at that time there was a septic tank to be put in later.

Q. Was Overseas Construction supposed to do that?

A. Slaughter was off Guam and didn't check. They were supposed to, I think. They put in an oil

(Testimony of Edward Thompson.)

drum instead of a septic tank—just something to get by.

Q. When did you commence discussing the terms of the partnership agreement with Mr. Siciliano?

A. Well, I had written him early in June and asked him if he was still interested in the deal and he wrote back that he was, but the actual verbal discussions occurred just shortly before we opened the store. We had to have a manager. I was [213] busy getting the equipment lined up so I couldn't spend much time talking to him, but I would say about the 18th or 19th we started talking—I mean definitely getting down to cases.

Q. Now, at the time you entered into this agreement with Mr. Siciliano, what did the Dairy Queen owe?

A. They owed $5,000 — $5,038 — something like that on the building contract. All the supplies that were on the island or in transit had been paid for.

Q. Now, when did the crew that Mr. Slaughter hired cease working down there?

A. On the 21st of June.

Q. Were they paid off—laid off?

A. They were paid off and laid off, yes.

Q. And you opened on the 22d?

A. We opened on the 22d, yes.

Q. Now, you left shortly after the 22d?

A. I left on the 24th.

Q. You left on the 24th for the States? Before you came to Guam, I take it your supplies came in by ship? A. Yes.

(Testimony of Edward Thompson.)

Q. Before you left to come to Guam, you had ordered the initial stock? A. I had, yes.

Q. Had it arrived here before you came?

A. Yes, all of it was here. [214]

Q. Now when did you first test the machines?

A. We tested the machines on the morning of the 22d. We were very anxious to get open so we opened that afternoon.

Q. What did that test consist of?

A. The test consisted of running mix through them to see that the machines were functioning properly and also to get the grease and maybe particles of steel that was in the machine out of the machine. The mix would carry all that out. The mix would be dark gray principally from grease that was left in the machine by the manufacturer.

Q. And you opened that afternoon?

A. Yes, June 22, 1952.

Q. Did you open a bank account?

A. We did. We opened that the day before or perhaps the 20th. I think we opened that the afternoon of the 20th.

Q. And who were authorized to sign checks from that bank account?

A. I understood I was and Mr. Siciliano. At that time I thought she was Madeline Siciliano but she was authorized also.

Q. Now with your additional supplies in there, your mix and supplies, etc., how were they ordered?

A. Well, they would send me an order telling me what they needed. I would write the manufacturers

(Testimony of Edward Thompson.)

or telephone the manufacturers and arrange for them to ship them. They would ship them and I would pay the invoices and send them over to Guam and [215] say "You owe me so much money," and they would send a check. Later on they provided me with a trust fund which I accounted for.

Q. Now you received seven or eight checks from Guam drawn on that account?

A. I don't remember the number but I received checks, yes.

Q. And you received some drafts from Guam?

A. Yes.

Q. What did you do with those documents?

A. With that money?

Q. Yes.

A. I put it in the bank. It was either to reimburse me for bills I paid—usually I paid them because they were in transit and we discounted all bills—or to pay bills in the future.

Q. Did you use your personal funds in paying these bills?

A. Most of the time I did. It was easier to do that than to use company funds and countersign the check.

Q. Did the company ever use their funds to pay these bills? A. Some of the time, yes.

Q. Some of the checks were to the corporation, made payable to the corporation? A. Yes.

Q. The original deal was the corporation was to get [216] $15,000?

(Testimony of Edward Thompson.)

A. The original deal was that the corporation was to get $15,000, yes.

Q. Do you recall how that $15,000 was paid to the corporation and where it was paid?

A. Well, on the afternoon of June 20th after I made Siciliano a definite offer, Siciliano and Madeline Dorsit said that sounded all right, so one or the other of them drew—I have forgotten which one—drew two checks for $7,500 each. One check I took with me back to the States. The other check Joe Siciliano and I took down to the Bank of America and opened a bank account under the name of Dairy Queen.

Q. Both checks were from Mr. Siciliano?

A. Yes.

Q. Half was left here in the business?

A. As a loan by the corporation, yes.

Q. And half went back to the corporation?

A. Yes.

Q. Now that was money due to the corporation at that time? A. Oh, yes.

Q. Now any other checks or drafts payable to the corporation in the States, what was done with them?

A. Well, Dairy Queen of Guam paid back that $7,500 some time in October and that was deposited in the company's bank account because it belonged to the company. All the other [217] money we used to pay bills.

Q. Let me go into this for a moment. An invoice or a bill would come in from a supplier?

(Testimony of Edward Thompson.)

A. That is right.

Q. The merchandise would be shipped to Guam?

A. That is right.

Q. The company in the States or you would pay the vendor of that merchandise?

A. Mix, especially, was cash on the barrelhead. We paid for mix in advance.

Q. You paid things in advance and if you used your own funds you would be reimbursed?

A. That is right. I got all my money back.

Q. Now the money would come from Guam—a $1,000 would come from Guam?

A. That is right.

Q. What records did you keep? What did you do with the invoices?

A. Well, originally in all cases, rather, as soon as I received the invoices I paid them and mailed them to Guam. Shipping documents if they came at the same time I mailed those to Guam. If they came a day or two later, they go as soon as they are received. I just mailed the original. I kept the duplicates to cut down on postage. Then in the beginning I would write Henry Diza and say—list the bills—and say "I paid [218] these bills" and ask him to send me a check. Henry would reply, sending me a bank draft or whatever it may be and that would wipe out that transaction. But that was a little slow. I was not only out this 2 or $3,000 but 2 or $3,000 more so Henry and I agreed he would furnish me a working fund of 6 or $7,000 and I would account for it at regular intervals. Usually I would

(Testimony of Edward Thompson.)

account for it twice a month but as soon as it got smoothed down I would account for it just once a month. I have it over there if you want to introduce it.

Q. You sent a copy of every invoice to Diza?

A. Oh, yes, every copy.

Q. Did you have a duplicate copy?

A. Yes, I kept a duplicate in Seattle.

Q. Outside of the $15,000 that went to the corporation do you know whether any money in excess of the amount of invoices plus rental charges was ever received by you or the corporation?

A. Of course, we used some money to invest in that Guam Frozen Products.

Q. I mean going back to the States.

A. Oh, no, none of that money there.

Q. Then all the money that was ever transmitted to the States was accounted for in invoices and bills? A. There was no diversion of funds.

Q. I mean Mr. Diza received supporting vouchers accounting [219] for every cent and the corporation has a copy of that in their files in Seattle?

A. That is right, yes.

Q. So that the only money that went to the States outside of $15,000 was in payment of bills and expenses in connection with the business?

A. Yes, sir. No money was to pay salaries or anything like that.

Q. Now did you receive a salary from the corporation? A. No, sir.

Q. Did you receive a salary from Dairy Queen?

(Testimony of Edward Thompson.)

A. Oh, I didn't receive a salary from either business, no.

Q. Have any of the stockholders ever received any dividends? A. No, sir.

Q. Have any of the officers or directors ever received any salaries or fees?

A. We agreed not to pay salaries or fees. There might be an exception. Mr. Little is secretary and attorney for the company. He might have received fees. His firm drafted the articles of incorporation and acted as our attorneys. I think they made a charge on the income tax, something like that.

Q. Now you were supposed to receive reports from Diza or from Mr. Siciliano and what types of reports did you receive?

A. I was supposed to receive the reports. I eventually [220] did get a profit and loss statement and financial statement. They were slow in coming and not regular. In fact I didn't receive any reports until some time in September because they were having trouble in setting up the books. Mrs. Matson who was supposed to supervise that was away from the island. I think she was in Bangkok or somewhere.

Q. Did you endeavor to get these reports?

A. Oh, I wrote about it, complained about it, yes.

Q. Who did you write to?

A. I wrote to Diza first, then I wrote to Lyle Turner and it was Lyle Turner who wrote me and I started getting them in September.

(Testimony of Edward Thompson.)

Q. You started getting them in September?

A. I got the reports for June and July, yes.

Q. When did you next get reports?

A. I don't remember.

Q. Did you get them systematically?

A. We got them. There would be delays and I would write and ask them about them. The delays were due to Henry being overworked. He speaks English better than he writes it and it is difficult for him to write in English.

Q. Did you receive letters from Henry Diza?

A. Yes.

Q. Did you receive letters from Mr. Meggo?

A. No, sir. I never heard from Meggo, never got a cable [221] from Meggo, never wrote to Meggo, and it was not until January when I was out here that I ever knew Meggo had any connection with the business. January 2 I wrote to Siciliano in Las Vegas that it seems that Meggo is in charge and he doesn't seem to be doing a very good job of it.

The Court: When was that?

A. January, '53, and that was the first information I had Meggo was supervising the work.

Q. Did Mr. Viet ever write to you?

A. No, I talked to him on the phone one day. I wanted to talk to Madeline and Viet said that Madeline was sick in bed and he didn't know enough about the business to help me any, but I gave him some messages for her.

Q. Now, Mr. Thompson, did the corporation

(Testimony of Edward Thompson.)

make any attempt to persuade Mr. Siciliano to return to Guam?

A. Will you raise your voice, Mr. Phelan?

Q. I am sorry. Did the corporation make any attempt to persuade Mr. Siciliano to return to Guam?

A. Yes, we kept after him constantly. Mr. Siciliano is mistaken when he said he phoned me and told me about his troubles. He phoned me at 3 a.m. I asked him what he was doing, getting me out of bed. I wasn't angry but I wanted to know why he wasn't running the store. He said he had to come over to do some buying and he said he was going to be there ten days, and it was in August that I heard he was having marital [222] troubles. I heard some bad news about it and I hoped it would be cleared up shortly.

Mr. Bohn: I suggest that these latter statements are not responsive to the question.

The Court: Well, the question was as to whether he attempted to get Mr. Siciliano to return. Now he is just describing——

A. Sometime in October the board of directors had a meeting. Some of the people were more disturbed than others over the failure of Joe to return in 1952. We all wanted him back, so we passed a resolution in connection with this partnership agreement. They passed a resolution approving the partnership agreement if Mr. Siciliano returned to Guam within 60 days of the date of that resolution, and I think I wrote a letter to Lyle Turner or to

(Testimony of Edward Thompson.)

Joe saying that if the 60 days specified in the resolution was too tough and if Lyle Turner could assure me Joe could get back there in 90 or even 120 days, I felt sure I could get the board of directors to agree to the change in the time limitation.

The Court: May I interrupt at this time. Mr. Thompson, when did you first put before the board of directors the fact that you had entered into this contract?

A. I left Guam on June 24, 1952. Joe and I had signed the contract but there was some typographical changes to be made by Mr. Turner. We signed them on the 23d and I left the next morning at 7 o'clock. Mr. Turner said "I have got to make these [223] corrections, but I will get them out to you on the next plane." They didn't come and it was not until after the 16th of July that I got those papers from Mr. Turner so I did not call a board of directors meeting until after the 16th of July.

The Court: Were the contracts signed here?

A. Yes.

The Court: I am not following you. If the contracts were signed, what typographical errors were involved?

A. I don't remember, sir. Maybe one word had to be changed, an omission. In other words, I didn't leave with the contracts. Mr. Turner was to mail them to me.

The Court: But the contracts had been executed?

(Testimony of Edward Thompson.)

A. The contracts had been executed by me and Mr. Siciliano, but Mr. Turner held up the contracts for some reason or other and they didn't reach me for about a month or six weeks. I got them about the 17th of July, I would say, so I couldn't call a meeting of the board of directors to pass on some papers which were not in my possession, so it was some time in August before we got the board to meet. By that time we had learned of Joe Siciliano's troubles. I explained the trouble and said Joe will probably get back in a few weeks. They said "What shall we do about it?" I suggested we hold it up a few weeks and do nothing and we did and then in October we had this formal resolution, which we mentioned.

The Court: As I understand, there was a board meeting in [224] August and at that time they had an opportunity to approve the contract?

A. Yes and because of Mr. Siciliano's absence, they decided to hold it up.

Q. (By Mr. Phelan): Did you act for Dairy Queen of Guam in the States as their purchasing agent or what capacity?

A. I was the purchasing agent. That is all that I did, yes.

Q. You placed orders and saw to the paper work?

A. Yes, saw they got on board ship—that sort of thing—paid the bills and sent all the documents to Guam.

Q. I take it that for some time now the Dairy

(Testimony of Edward Thompson.)

Queen has not owed you any money for advances, that is all cleared up?

A. Occasionally they owe me a few hundred dollars because sometimes I pay more than I have on hand, but they pay it back.

Q. Is that money kept separate from the corporate funds of American Pacific Dairy Products?

A. I don't use the corporate funds at all any more. I just paid them personally.

Q. You paid them yourself—advanced the cash and got it back? A. Yes.

Q. Now, Mr. Thompson, have you got the bank statements and bank book of this Dairy Queen account on Guam?

A. They are in that brief case there. [225]

Q. Do you recall—can you identify them?

A. If you pass the brief case. I also have the deposit books; the deposits shown on the bank statement, which would agree. The first deposit was June 20, 1952, $7,500; that is the one.

Mr. Phelan: I don't want to offer them into evidence and have to copy the bank statements and stuff like that, but there are only a few deposits. I would like to read the deposits and dates into the record.

A. There are not very many of them.

The Court: Well, now these are the deposits made in the name of Dairy Queen?

Mr. Phelan: Starting at the time this contract was entered into through May 29, 1953, when he quit depositing under the Dairy Queen of Guam.

(Testimony of Edward Thompson.)

The Court: Now it is understood that $7,500 was capital?

A. As a loan.

Mr. Phelan: That was left for operating capital, loaned to the partnership. It wasn't excess capital after a partner put in his capital consideration.

A. You want me to read them?

Mr. Bohn: I have no objection.

Mr. Phelan: Please.

A. All right. This is 1952. The first one as I said before was June 20 and was $7,500; June 30, $1,289.85; July 2, [226] $1,516.80; July 19, $36.80; the 14th, $2,530.15; the 22d, $3,934.50. There were no deposits made from July 22 until September 18 when $426 was deposited. On September 25, $361. On the same day, $1,663. There were no deposits in October or November. In December the deposit was $4,268.50. On December 30, the deposits were $4,000. January 19, 1953, $1,000. The same date, $2,000; the 20th, $1,959. February 3, $1,000; March 11, $2,147; March 12, $4,000; March 25, $2,841; April 13, $2,000; April 24, $1,195. That was the first deposit my son made. April 27, $6,669; April 29, $1,665; May 3, $839; May 29, $339.65. There were no deposits after that to this account.

Q. (By Mr. Phelan): After what date were the deposits made by Norman Thompson?

A. Beginning with that April 24, 1953, deposit.

Q. Mr. Thompson, have you got the cancelled checks of that account?

A. Of that account, yes.

(Testimony of Edward Thompson.)

Q. Would you read the dates and amounts of those checks?

A. Well, the first date is—let's see—I don't have check No. 1. Check No. 1 was $5,038.57 and payable to the Overseas Construction Company. Here it is. I didn't get it out when I got the rest of them. Shall I read the rest of them?

Q. Please.

A. June 27, 1952, Check No. 2 was paid to the Government of Guam for $496.18. On June 28, Check No. 3, $1,118. That was [227] for extras on the Overseas Construction Company contract. On July 1, $555 payable to Getz Brothers. On July 2, $58.76, payable to General Transfer Company for hauling supplies. July 4, cash $77.10. All of these checks except the first one were signed by Madeline Dorsit. The first one was signed by Joe Siciliano. July 10, $105 to Guam Daily News, signed by Madeline Dorsit. July 15, Check No. 8, $60.13, signed Madeline Dorsit, payable to the Treasurer of Guam. There were no checks 9 and 10 as they were canceled for some reason; I don't know. Check No. 12, October 2, $7,500, payable to—this is in payment of that loan and signed by me. I think all the checks after that were signed by me. November 17, payable to Edward Thompson, $4,295.50, in payment, it says here, for 44 drums of mix. Check No. 14, December 1, $32.40—it doesn't say what it covers. Check No. 15, December 8, $4,700 payable to American Pacific Dairy Products. Check No. 16, $537.76, payable to

(Testimony of Edward Thompson.)

Edward Thompson. Check No. 17, $1,200, dated January 3, 1953, payable to Edward Thompson. Check No. 18, February 2, $5,000, payable to Edward Thompson. Check No. 19, March 23, $8,000. Check No. 19 was paid to Edward Thompson. Check No. 20, Edward Thompson, $10,000. Check No. 21—that last check was April 30—June 22, payable to Edward Thompson, $6,000. And here is an unnumbered check but dated. It's for $1,000 payable to American Pacific Dairy Products. It was deposited some time in February. I don't get the date. I can't tell the date it [228] was paid; the cancellation machine has gone right through that. It was deposited in the States early in February.

The Court: I am not sure, Mr. Phelan, I understand the purpose of this. It appears to be normal business transactions.

Mr. Phelan: I think it also has a bearing on Mr. Siciliano's management; for the period of approximately one year less than 20 bank deposits were made for a business of this size.

The Court: Well, I am assuming that we are not concerned with that because Mr. Thompson has already stated that he is satisfied with the reports which were furnished and that those correctly state the business, as correct as possible, that was transacted.

Mr. Phelan: Yes, but I want to bring out and show the lack of proper business management. I am not trying to account for that money over a period of a couple of months running when Siciliano's management didn't even deposit it in the bank.

(Testimony of Edward Thompson.)

What I want to bring out is Mr. Siciliano's management or lack of management. I also, of course, based upon the direct examination of plaintiff's case, want to account for what Mr. Thompson did with all those checks that went to him.

The Court: Yes, I am not sure that the bank account is as nearly valid as the books. I quite agree with you that it is difficult to understand why, having a bank account, the bank account is not used for the payment of bills and accounts as a control over receipts and expenditures, but the fact is that [229] it didn't; that the bank account does not reflect the business transactions.

Mr. Phelan: That is true. I want to bring that out.

The Court: So that you have to go to your books.

Mr. Phelan: Yes.

Q. (By Mr. Phelan): Now, Mr. Thompson, you left Guam in June of 1952? A. Yes, sir.

Q. Did you return to Guam? When was the next time you returned to Guam?

A. December 28, 1952.

Q. How long were you on Guam at that time?

A. Until about the 4th or 5th of January, I would guess.

Q. Did you go down to the Dairy Queen?

A. Oh, yes.

Q. Would you describe the conditions of the Dairy Queen as you found them?

A. Well, the first day I got up here, of course, I

(Testimony of Edward Thompson.)

went up to the office to see Henry Diza. I wanted to straighten some things out with him. While I was talking to him Joe Meggo and Wally Viet came in. They knew I was in town so I expected to see them. I don't know whether they came in simultaneously or not. Joe Meggo told me we needed more freezers, more deep freeze cabinets for quarts and pints. He said we didn't have enough freezers to take care of the business. Well, I was [230] operating 11 stores in the States and I and friends opened more and I know what it takes without too much trouble. There are about 2,500 of these Dairy Queen stores in the States and I doubt if 50 of them have more than two holding cabinets. We had only one flavor—vanilla. I had sent over other flavors but they had never been used. They were in the warehouse. I told Joe he must be crazy but I would check into it. I went down to the store and the Filipino boys were complaining. They were working seven days a week and working overtime every day. I said I would check into it. I found that instead of working on just one shift, they were working two shifts. I think this boy Tony was the lead man and a pretty good boy and when he got up, the rest of them got up and went down and the store didn't open until 1 o'clock in the afternoon instead of 10. All four men would be there at the same time and all four men would stay there and clean up at night and Henry and Joe Meggo came down to help them, as Henry Diza has testified. There must have been more helpers than there was cubic feet in the store. We corrected those

(Testimony of Edward Thompson.)

conditions. I didn't want to speak to the Filipino boys; I didn't know them well enough and they were sensitive. Wally Viet explained that two men had to come in in the morning and two men in the afternoon. Later on I got a letter from Henry Diza and he said the new shifts were working out and everybody was working and, incidentally, we paid the overtime wages that they had coming to them. [231]

The Court: That was in December?

A. December or the early part of January, 1953. Then I checked on the freezers. At no time during the day was the second freezer in operation until 3 o'clock so when they could not take care of the quarts and pints trade they had to draw out of the freezer, which was not satisfactory, and at no time during that period was the deep freeze holding cabinet as much as half full—I mean as much as half full—and in a letter to Joe I commented on that. On December 31 we were closed on account of the typhoon. I told Joe to get both crews down there at 8 o'clock in the morning. Tony had too much New Year's Eve so I had to get him out of bed and a little after noon Tony came down there——

Q. (By Mr. Phelan): Now during this period you were here about ten days?

A. Not quite ten days—I would say about a week.

Q. During this period did you see Mr. Meggo at the store? A. No, sir.

Q. Did you see Mr. Diza at the store?

A. I think Diza came down once in awhile to get

(Testimony of Edward Thompson.)

a milk shake. He and Wally Viet would ride down to get milk shakes.

Q. How much of the time did you stay at the store?

A. I was at the store every day until about 10 o'clock at night unless I went up to the office to see Henry.

Q. Do you recall how the cash was handled at that time? [232]

A. When I came there was only one shift, only one bank, and Tony would take the cash up at night in his money sack. He would take it to his place, where he lived, and deliver it to Diza the next morning. Then the next morning they would read the cash register if it was working—I presume they would read it.

Q. Were you there when they opened up in the morning?

A. Yes, I was there every morning. I got there about 10 o'clock in the morning.

Q. Mr. Meggo didn't come down to read it in the morning?

A. He might have come while I was there but he didn't come at opening time, no.

Q. Do you remember how the men got down to the Dairy Queen?

A. They came in the reefer truck or some truck.

Q. Did Mr. Meggo drive them?

A. I don't remember. It didn't register if I saw him.

Q. Talking about the snack bar—what was the first time you knew about that?

(Testimony of Edward Thompson.)

A. You mean the addition to the store?

Q. Yes.

A. It was on August 2 when a friend of mine on Guam told me I wouldn't recognize the store any more because they had put on an addition and just about the same time I got a letter from the Fuller Company, a glass company in San Francisco, and Fuller [233] said Mr. Siciliano had ordered some glass like the previous glass but asked that the bill be sent to his post office box in Guam instead of to me in Seattle and they wanted to know what I wanted done about it. I said I didn't know about any need for glass on Guam and I suggested he hold it up until I could check. I hadn't seen or heard from Mr. Siciliano since the 2d. I checked it up and found it was this addition so I did nothing more about it.

Q. When you came to Guam in December was that addition completed?

A. Everything except the glass.

Q. Will you describe the addition?

A. It shoots off the original store in an "L." It is roughly 30 feet long and 15 or 16 feet wide. I heard Mr. Meggo say it was built to sell ice cream from these freezers, but in my mind that would have been impossible for several reasons. One reason is that these freezers, the freezing is done by compressors. Those compressors are cooled by—the Dairy Queen freezers were cooled by running water. Now it is customary to catch that running water in

(Testimony of Edward Thompson.)

a waste pipe which runs under the floor and carries it away. There was no waste pipe to carry off any running water. Second, those freezers each have 2 h.p. motors. It is customary to bury the conduit under the cement and bring it up by each freezer so that the power will reach.

The Court: Now which freezers are we talking about? [234]

A. These are the freezers Joe Meggo said he was going to get for the addition. Furthermore, those freezers were never ordered. They were for a 220 volt power line and there was no 220 volt coming into the store. The wiring was for 110 volt, for a very small house. Furthermore there was a 30 amp. fuse box. You couldn't run a freezer on 30 amps. You need 60. Another thing, the dispensing room or salesroom for the freezers was too long, ten feet more than was needed. Right in the corner where one of the freezers would have to be, the sales window was directly in front. There was roughed-in plumbing for a sink and pipes coming out for water and for the drain, but the sink was missing, but it would have been impossible to put a sink there and a freezer in the same place, so I am of the opinion that the addition was not built for the Dairy Queen operations. At that time the Dairy Queen had money enough to pay for it. American Pacific was not asked to pay for it. The money was paid out of Joseph Siciliano's funds. I knew nothing about it and when I finally talked about it to Mr. Siciliano he said "You must have been excited. We talked about it."

(Testimony of Edward Thompson.)

The Court: Tell me, what use was made out of it?

A. It stayed vacant for a long time. Some time during the summer of 1954 my son wrote and said he would like to convert it into an office and into a bedroom. I told him Joe Siciliano had spent the money and hadn't been reimbursed and if he wanted to take the same chance Joe Siciliano took about losing his money, [235] it was OK. He spent $400 boarding it up, making it look like the rest of the building and putting in lights and stuff, plumbing and stuff like that.

The Court: Do I understand it was never used until it was converted for housing?

A. Except the back half.

The Court: Now where did you do your warehousing?

A. Out toward Tamuning; I don't know the legal description but you go past the Talk of the Town and turn left. We have rented a warehouse out there.

The Court: How much do you claim for this addition?

Mr. Bohn: I think it is roughly $4,000.

Mr. Phelan: Around $4,000.

The Court: The court will take a 15-minute recess at this time.

(The court recessed at 10:55 a.m., February 15, 1955, and reconvened at 11:40 a.m, February 15, 1955.)

(Testimony of Edward Thompson.)

Mr. Phelan: Will you please read back the last question?

(The reporter complied with the request.)

Mr. Phelan: May this be accepted in evidence, your Honor? It is the certified articles of incorporation of the American Pacific Dairy Products, properly certified, by the State of Washington.

The Court: Have the witness identify it.

Mr. Phelan: Will you identify this? [236]

A. Yes, these are articles of incorporation. I got them from the Secretary of State, State of Washington.

The Court: That is Defendant's Exhibit A?

A. Yes.

Q. (By Mr. Phelan): Mr. Thompson, I show you a paper which purports to be a certified copy of excerpts from the minutes of the board of directors. Can you identify that?

A. Yes, that is a resolution appointing Joe Siciliano as agent on Guam.

Mr. Phelan: May this be accepted as Defendant's Exhibit B?

Q. (By Mr. Phelan): I show you a document which purports to be excerpts from a special meeting of the board of directors held August 22, 1951. I show you that. Can you identify that, Mr. Thompson?

A. Yes, this is a resolution rescinding the appointment of Joe Siciliano as manager on Guam.

(Testimony of Edward Thompson.)

Mr. Phelan: I offer this as Defendant's Exhibit C.

Q. (By Mr. Phelan): I show you a document which purports to be excerpts from the annual meeting of the board of directors on February 25, 1952. Can you identify that document, please?

A. Yes, this is a copy of the minutes of the meeting.

Mr. Phelan: I believe this is D.

Q. (By Mr. Phelan): Mr. Thompson, I show you a document which purports to be excerpts from special meeting of the board [237] of directors of American Pacific Dairy Products on the 6th day of October, 1952. Can you tell us what that document is?

A. This is excerpts from the minutes of the board of directors meeting on October 6, 1952, yes.

Mr. Phelan: I believe this is Defendant's Exhibit E.

Mr. Bohn: Do I understand, Mr. Phelan, you are introducing these in evidence not in order to establish the truth of the facts therein set forth but merely that they were actions taken by the board, is that correct?

Mr. Phelan: Yes, these are copies of actions taken by the board since they have been attached to the pleadings and they have been discussed.

Mr. Bohn: I won't object on that basis.

Q. (By Mr. Phelan): Will you examine that document and tell us what it is?

A. This is excerpts from the minutes of the

(Testimony of Edward Thompson.)

special meeting of the board of directors held April 4, 1953.

Mr. Bohn: No objection if they are introduced just for the purpose of the action of the board.

Mr. Phelan: That will be F, Cris.

Q. (By Mr. Phelan): Mr. Thompson, just before we recessed you said something about that extension down at the Dairy Queen?

A. I was discussing it, yes.

Q. Would you describe the layout of it? Did you mention the partition, that is what I mean? [238]

A. There was a front room and back room, yes. Do you mean as it was originally?

Q. Yes, when you saw it in December.

A. Yes, there was a partition. It was divided into a front room and back room and the back room was a small storage space.

Q. Approximately what were the dimensions of the two divisions of that "L"?

A. I would say it was about 30 inches long——

The Court: You mean feet?

A. Feet, yes. sir, and the front room was about 12 feet wide and the back room would be about 6. I measured the front but I didn't measure the back.

Q. (By Mr. Phelan): Now, Mr. Thompson, can you show where in the books of the Dairy Queen are the amounts of money that were transmitted to you for purchasing supplies in the states? Can you point that out in the books?

A. Oh, yes, it is in the books.

Q. The money that was sent to you?

(Testimony of Edward Thompson.)

A. Yes, it is in that book that is folded over there. That is the one because yesterday when Mr. Bohn was calling out these amounts I was checking them against the books.

The Court: Now let's have it understood that it shows that the money was sent to Mr. Thompson but it doesn't show the purpose. [239]

A. No, the books only show the money was sent. The purpose was set down in the journal entries.

Q. (By Mr. Phelan): Have you got the purpose?

A. I have got the journal entries which say for supplies or mix.

Q. Can you get them?

A. I can get up and get them; it might be quicker. Now for instance, here is a letter from Henry Diza dated August 5, 1952. He said, "Dear Mr. Thompson: I am enclosing a sight draft for $4,670 in payment of the items listed—40 drums of ice milk solids." On his ledger he charges the difference as the cost of buying the draft and then he mentions some other things underneath there—$4,610. Now here is another enclosing a bank draft for $1,728 in payment of the following supplies—well, the amount in the books is slightly more, a dollar or two more, which is due to the bank charge for making a draft. He gives a list of supplies. He has charged those supplies on his books by journal voucher. He would make up a journal voucher to cover those remittances because I would check that and the figures had to balance or I would ask

(Testimony of Edward Thompson.)

questions. I thought it was a high rate for bank interest, but he would make the journal vouchers. For instance, here is one journal voucher. It covers a check for $1,620.39. He shows he charges supplies—Henry called supplies bags, containers, janitor supplies and things like that, merchandise, that is anything except ice cream [240] toppings—and then he had freight, of course. I paid the freight. And then general overhead and miscellaneous expenses. Those were expenditures I had made—and then credits that check he sent me.

The Court: What is the general overhead?

A. A general overhead, $79.86. I would have to look at that, sir.

The Court: I mean did it represent local expenditures?

A. No, sir, that is something I bought for expense rather than supplies. It might be any one of a number of things. It might be freight on repair parts, something like that. It would be a part of the cost of supplies.

The Court: Well, I think that is enough.

Mr. Phelan: I think we should introduce it because everything previously has been conclusions.

The Court: Well, do whatever you want.

Mr. Phelan: I don't want to needlessly prolong the time of the court, but I think we should actually introduce some of these records. I believe they are books of orginal entry.

The Court: At that time you will also introduce the books which Mr. Norman Thompson received?

(Testimony of Edward Thompson.)

Mr. Phelan: Of course, I am not trying to hide anything.

The Court: Put those altogether and introduce them as one exhibit.

Q. (By Mr. Phelan): Now are there any other books here, [241] Mr. Thompson, that were maintained by Mr. Diza?

A. No, just these two books and the ledger. I don't know what happened to the ledger. Those are just working papers. If you look at them they are the trial balances and things like that which are not books of record.

Q. Were they maintained here?

A. They must have been, yes.

Q. Would you read into the record what these books are?

A. A cash disbursement book and a journal. The journal was used to enter deposits and sales and these are his journal vouchers, month by month, I think. You see it wasn't a very complicated system. These were probably in a bound book at one time. These are just the letters that he sent me with the money.

Mr. Phelan: They should be a separate exhibit if they go in because they are not a part of the books that were turned over. Are those the ones that went to you?

A. Yes, sir, these are the ones that went to me.

Mr. Phelan: Can these be accepted?

(Testimony of Edward Thompson.)

Mr. Bohn: As I understand, what you are now offering in evidence is cash disbursement and cash income account and journal vouchers, is that correct?

Mr. Phelan: Yes.

Mr. Bohn: And that is all you are offering at this time?

Mr. Phelan: At this time, yes. "G" I believe, Cris.

The Court: Now the cash account should be introduced as [242] one exhibit and the journal entries should be introduced as a separate exhibit.

Mr. Phelan: Make them G and H.

Mr. Bohn: The large journal, as I understand it, is cash and the loose-leaf pages now in the possession of the clerk are the journal vouchers?

The Court: Income and outgoing. These are introduced as defendant's exhibits with the understanding that they have previously been identified by Mr. Diza. This is a very bad way to introduce exhibits. These should be fastened together and introduced as one exhibit.

Q. (By Mr. Phelan): Now I am going to ask Mr. Thompson to point out in some of the transactions covered by the checks and payments——

The Court: Ask him what?

Mr. Phelan: To point out in these books the evidences of some of the checks to him, the payments to him or money sent to the States for purpose of supplies. You see, actually, your Honor, all we have got so

(Testimony of Edward Thompson.)

far are conclusions on that and his statement that he bought supplies and shipped them to Guam.

The Court: Now I wonder if you are not unduly complicating this. It is not essential for purposes of this action that we go over every transaction.

Mr. Thompson: I was about to say, your honor, that Henry Diza's figures on the reports he sent to me showing how we [243] stood on this trust fund always agreed with my figures. I didn't question his figures when his statements would come through.

Mr. Phelan: Perhaps we can show those figures are in these books and we won't have to go any further.

The Court: It seems to me you have tied this thing up until approximately May 1, since both parties are in agreement as to the reports. Now those reports are based upon your cash book, your journal entries and others. If you agree on those reports, as you have, it isn't necessary to go in back of them surely.

Mr. Thompson: I checked them and especially the amounts he had me charged with or credited with as the case may be. When he showed I owed him $500 as money unexpended, I would check with my figures and it always checked. If it hadn't, of course, I would have taken it up with him but in every case it did.

The Court: Do you have reports, Mr. Thompson, for every month that the business was operated by Siciliano?

Mr. Phelan: Well, there are such reports avail-

(Testimony of Edward Thompson.)

able. I do not have them. They are in the custody of Mr. Thompson. They are available here in the room.

A. They are available for every month. In fact, your honor, there are reports of a similar nature for every month the business was operated except the month of June, '53, but the same system of reports were continued by the successive operators and the same format was followed. [244]

The Court: Well, of course, it would be of assistance if all these reports were bound, fastened together in consecutive order.

Mr. Bohn: I would welcome that, your Honor. With apologies to Mr. Phelan, Mr. Thompson just stated he would be willing to bind them together during the noon recess consecutively because that gives us the best picture in capsule form that we can get.

Mr. Phelan: Are these the reports, Mr. Thompson? A. Yes, these are the ones.

Mr. Bohn: As I understand the situation, and if my interpretation is out of order I apologize, those reports are complete with the exception of that one month?

Mr. Phelan: June, '53. If Mr. Thompson can put them in order and get them stapled, we can introduce them all as one exhibit.

The Court: Yes, that was my thought. There was a report originally for July, '52?

Mr. Bohn: There was one for June also, too, your Honor. They start with June of '52, and con-

(Testimony of Edward Thompson.)

clude with November of '53, and Mr. Thompson testified—I beg your pardon—from June of '52 through November '54—and Mr. Thompson testified that he had not yet had the report prepared for December.

The Court: Yes, I think it would be well to have all of those. [245]

Mr. Phelan: He may have information about June.

Mr. Thompson: It can be picked up easily.

The Court: Then you are going to fasten those and introduce this other separately?

Mr. Phelan: Well, I want to ask him some questions about those.

Q. (By Mr. Phelan): Now, Mr. Thompson, from these reports can you compute the expenses? Do they disclose the expenses broken down by categories for each and every month?

A. The reports show expenses broken down by categories, yes.

Q. And those expenses are supported by other books of the corporation? A. Yes.

Q. You can show the various items of expense, supplies, personnel and all that?

A. They are in the reports.

Q. And you can show the profit by month?

A. It's in there.

Q. And loss? A. Yes.

Mr. Phelan: I think until I can start asking questions on the books I am about through with questions. When we get the books introduced I

(Testimony of Edward Thompson.)

can then ask him further questions along the line we are discussing. [246]

The Court: Well, of course, the books speak for themselves. I am not attempting and will not attempt to compile all of the information contained in the books. I understood at the pretrial conference that all of these were to be audited and an accountant was going to testify.

Mr. Bohn: The statement was made that we were going to have these books audited. Mr. Miller has checked them. He has not performed a complete audit and the reason being not only the shortness of time but the further thought that in the event your Honor wished to determine the legal points in the trial and then assuming there are logical reasons for it, the possibility would appear for the appointment of a receiver for a complete acounting. I would be happy to have Mr. Miller present if the court would like to hear him, but it was from his report that I was asking the questions yesterday.

The Court: What does his report cover?

Mr. Bohn: It covers basically the information which has already been brought before the court.

The Court: Does it give you totals?

Mr. Bohn: It gives us totals, that is correct, and the totals are all in those reports and he has spot-checked them as Mr. Thompson has done and found no discrepancies so far with the exception of——

The Court: I recall that the record to date gives us no totals. It gives us a month to month summary,

(Testimony of Edward Thompson.)

according to [247] your compilation, but we have no compilation before us as to totals.

Mr. Thompson: If I may interrupt—we have been discussing profit and loss but in those same reports there is a statement of the financial position of the business that is a total.

The Court: Is it cumulative? A. Yes, sir.

The Court: Let me have the report for May of 1953.

A. Yes, sir.

The Court: I would like to see one of them.

A. They are not in sequence. Always the last one. This is cumulative up to date from the beginning to the end of May. That is the financial position of the corporation.

Q. (By Mr. Phelan): From the opening day, Mr. Thompson?

A. From the opening day right straight through to the end of May, '53, and that was taken from the books of the company.

The Court: I presume, Mr. Thompson, that you outlined the type of report that you wanted?

A. I did, sir.

The Court: I can't imagine them going into this detail unless you did.

A. I asked for it, yes.

The Court: And you told him in detail? [248]

A. Exactly how it should be done, and I think they followed instructions from the beginning.

The Court: Now I would just keep this among

(Testimony of Edward Thompson.)

the exhibits because you are going to introduce all of them.

Mr. Phelan: Yes.

The Court: And we will take our noon recess and one of the matters that came up in discussion with counsel which was not incorporated in the record, Mr. Thompson, was the statement that during the period that the Siciliano interests were operating this business that your gross sales showed a profit. There was a profit of around 33 per cent but after Norman took over the operation, with the same amount of sales, there was only a profit of 16 or 17 per cent and since that question would arise, I wonder if during the noon recess you would give it some thought so that we can refer to it.

A. All right.

The Court: The court will stand recessed until 1:30.

(The court recessed at 12:10 p.m., February 15, 1955, and reconvened at 1:30 p.m., February 15, 1955.)

The Court: You are not through with Mr. Thompson?

Mr. Phelan: Not yet, your Honor.

Q. (By Mr. Phelan): Mr. Thompson, I show you a file—I believe the court has one of these reports?

The Court: I have May, 1953.

Q. (By Mr. Phelan): Containing various documents purporting [249] to be reports of the opera-

(Testimony of Edward Thompson.)

tions of the business known as the Dairy Queen and ask you if you will look at that and tell us what it is?

A. This is the reports from the beginning of June, 1952, through November 30, 1954, with the exception of June, 1953, and May, 1953. The court has May, 1953.

Mr. Phelan: May it be considered as part of this?

The Court: Yes; with your permission I will just attach it and have it introduced as one exhibit.

Q. (By Mr. Phelan): The only one missing is June, 1953? A. Yes.

Q. Will you tell us why June, 1953, is missing?

A. We didn't make any for that month. There was none made for that month.

Mr. Phelan: I believe this is Defendant's Exhibit H and the one the court has is part of this exhibit.

The Court: Yes; I will just attach this.

Q. (By Mr. Phelan): Now, Mr. Thompson, what do these exhibits show?

A. They show the results of the operation of the business at the end of each month and show the financial position of the company at the end of each month.

Q. Do they show the expenditures and sales?

A. Oh, yes; it goes into detail.

Q. Does it show the monthly profit and all [250] that?

A. It shows the cumulative profit but it is easy

(Testimony of Edward Thompson.)

to determine the monthly by subtracting the cumulative from the previous report.

Q. Now, Mr. Thompson, have you, yourself, personally kept the books for this corporation for any period of time whatsoever?

A. Oh, I did for two months.

Q. Did you keep tabs on how long it took you to do that?

A. Yes, I did. I kept the books, did all the posting, made the journal vouchers and incidental work for the months of April and May, 1954. It took about an hour and 15 or 20 minutes for the work I did. Of course, I wrote up no checks and I didn't handle the payroll and I accepted the figures of the sales and just added them up.

Q. Mr. Thompson, the figures in these last reports put in—do you know what their source was?

A. Well, up to a certain period they were from Henry Diza. After that from Norman Thompson.

Q. Where would they get those figures?

A. They would get them from several sources. For instance, sales would be the amount of money turned in each day; the expenses would be the payroll they incurred on Guam, the miscellaneous expenses incurred on Guam, the utility charges paid on Guam, a two per cent sales tax on Guam, plus the cost of the materials of various kinds that I bought in the States and making the adjustment in inventory, the goods on hand. [251]

Q. These reports would be made up from the vouchers and other books of record in the business?

(Testimony of Edward Thompson.)

A. They would be made up from the books of record, yes, the vouchers supporting the books of record, but they would be made up from the ledger.

Q. This is really an analysis of the books for the month? A. Yes; that is it.

Q. Now, with respect to the merchandise you ordered for the business in the States for which money was sent to you to pay for, how do these books account for that?

A. They check out with the figures I kept in the States.

Q. Mr. Thompson, do you have any other books for the business known as Dairy Queen?

A. I have a journal we use at the present time, yes; it is here.

Q. Do you know what period that covers?

A. I think from July, 1953, to date.

Q. Do you have any other books present?

A. Oh, we have a ledger but the recaps of all of those are found in the States on file.

Q. And these other books of record are the supporting documents from which you or Mr. Norman Thompson made the reports you submitted?

A. No; did I say I or Norman Thompson made the report? I didn't make them. [252]

Q. But the present set of books supports the figures in those reports? A. Oh, yes.

Mr. Phelan: Your witness.

(Testimony of Edward Thompson.)

Cross-Examination

By Mr. Bohn:

Q. Mr. Thompson, I would like to ask you some questions about these figures and about these reports. There appears from your testimony to be no substantial conflict in the figures submitted from here in either tenure of management and those which you, yourself, kept and checked. Now I have made some quick calculations and I find, subject to the correction in mathematics, that the following are the percentages of profit to sales during the months which Pacific Enterprises, the Siciliano organization, operated this business: The first month for which a profit and loss statement is contained, according to my records, is September, 1952. That month I show that the profit was 45 per cent of the sales. A. That is gross or net profit?

Q. Well, the profit as set forth in the report. For the month of October I find the relationship of sales to profit in the report as showing 41.9 per cent. For the month of November the percentage is 41 per cent. For December it is 32 per cent; for January it is 38.2; for February it is 37.5 per cent; for March it is 40.2 per cent; for April it is 37 per cent. That is, [253] as I understand the testimony of all the witnesses, the last month that the Siciliano organization operated this business. Beginning in May the first figure I have of the relationship of profits set forth to sales is 34 per cent; for June we have no figures at all; for July I find it has dropped

(Testimony of Edward Thompson.)

to 17 per cent; for August it goes up to 27 per cent; for September it is 27 per cent; for October it is 28 per cent—wait a minute—there seems to be something wrong with these figures. May I be excused just a minute? Correction—my figures indicate that in October the proportion of profit to sales is 20.8 per cent; the next month it is 24 per cent; the next month, which would be December, '53, 21 per cent; the next month, 22 per cent, January, '54; February of '54 it is 20 per cent; March of '54 it is 19 per cent; April of '54 it is 18 per cent; May of '54 it is 19 per cent; June of '54 it is 18 per cent; July of '54 it is 20 per cent; August of '54 it is 20 per cent; September of '54 there is a 54 per cent loss in relation to profit; in November there is a 14.6 per cent loss; rather in October there is a 14.6 per cent loss and in November a 15.7 per cent loss. Now if my percentages are correct there never was a single month during the operation of Norman Thompson where the ratio of profit and sales was as great as the smallest month in the previous operation. Do you have any explanation for that?

A. Yes, I think you are right at that. The sales when we first opened were terrifically high and we were making about [254] 65 per cent on every dollar we took in. Now, when Norman first came in the sales held up fairly well, but as you will notice in those early days the percentage of net profit dropped for these reasons—we had to send Norman Thompson over here. That cost us $600, roughly. He was drawing a salary of $500 and we were paying $46 a

(Testimony of Edward Thompson.)

month for power. The Government of Guam put in a meter and now we are paying over $200 a month for power. In the early days when we were running up those percentages we had very little for expenses, very little for warehouse or for drayage—all of those account for the differences.

Q. In other words, those services you just mentioned were the services performed by Siciliano's organization? A. Yes, that is right.

Q. I would like—if my percentages are correct, for the 11 months ending in April, 1953, the percentage of profit to gross sales was 37 per cent. I was unable to get an 11-month period during your operation because of the way the figures are set up, but I took a 12-month average, which would be for the period ending August, 1954, from September 1, 1953. There is one additional month involved, but if my figures are correct, the gross is almost identical for the 11-month period previously specified for Siciliano's organization. The gross is $81,361.03 and for the 12-month period I just mentioned for Norman Thompson's operation it was $81,000.73. One was for 12 months and one [255] was 11.

A. No, Siciliano's operation couldn't have been 11: it was probably 10.

Q. Now, during that period of time the Siciliano average was 37 per cent. If my percentages are correct, your average was 20 per cent as between sales and profit. Now, conceding that there is one month's difference——

(Testimony of Edward Thompson.)

A. Almost two months.

Q. And hence there would be some difference because of the difference in time, nevertheless there is the substantial difference. What, in your judgment, accounts for that difference?

A. Additional expense for Norman Thompson's salary, warehouse and so forth. It made a difference.

Q. Do you pay your own travel expenses?

A. Yes, I always have.

Q. And part of your original capital was travel expense? A. Yes.

Q. Now, I have a few more questions to ask you on these books and reports you have. As I understand the situation there has been placed in evidence a cash book showing cash income and cash disbursements. There also has been placed in evidence journal vouchers. There has also been placed in evidence these reports which we have been discussing previously in the record. There has not been placed in evidence, as I understand, the general ledger? [256]

A. That is correct.

Q. Now, a general ledger has always been kept, has it not? A. Always been kept, yes.

Q. Now, I think I asked you about it yesterday —the general ledger that has been kept is this book which I am now showing to you?

A. Well, there was one before that, but a similar one, I presume.

Q. What is the first entry in this ledger?

A. I would say July 1, 1953.

(Testimony of Edward Thompson.)

Q. And that does not include, obviously, any of the records kept by Mr. Diza?

A. That is right, sir.

Q. Can you tell us where those records are?

A. Some of them are over there—the journal vouchers and the books of original entry. I don't know where the ledger is. I never saw it. Norman Thompson admitted he gave him the ledger. He doesn't remember giving it back. He searched for it around the office and it has been lost.

Q. Can you tell what happened to the business during the month of June, 1953?

A. I can just give you the sales, that is about all.

Q. Can you give me the profit and loss?

A. Not right here. It would be in Seattle, but I haven't the figure here. [257]

Q. Well, why were the books for the month of June retained in Seattle and the books for the remaining months brought out here?

A. Well, I will tell you why that is. I wrote the books up in July and started out to set the books up out here as of July 1, 1953.

Q. We have the report for May and, in accordance with your previous testimony, that reflects the condition of the books for May, and therefore we may assume that is an accurate reflection of the business. We apparently have nothing before us whatsoever for the month of June, 1953?

A. Not here we haven't.

Q. Well, how do you account for the fact that you have accounted for every month meticulously

(Testimony of Edward Thompson.)

—both yourself, Norman Thompson and Mr. Diza have accounted for every month meitculously and are in agreement except for the month of June?

A. Well, I will tell you. It was in May, 1953, they sent a notice to Joe Siciliano that American Pacific Dairy Products had refused to ratify the contract. Termination was the term I think they used, so I got a new set of journal and ledger because from then on we were going to carry it as a corporation, breaking off the agreement. So, the month of June, I kept that in Seattle. July 1st I transferred the net results to another set of books and sent them over to Norman and told Norman to keep them from then on. [258]

Q. Did you make the entries for the month of June? A. Yes, in the books in Seattle.

Q. You never transferred them out here?

A. We never transferred them. That was an oversight on my part. The need for it didn't occur to me to tell you the truth.

Q. Do you have the report for May?

A. Yes.

Q. You have the records for July, not for June. Let's go back for a moment. June was the month when—withdraw that question. Going back to a question that I asked you when I called you as an adverse witness yesterday—I want to again point out to you this: That as of May 31, 1953, the sales were $91,806.67; profit was $31,403.47, is that correct? Is it not the figures taken from the report?

(Testimony of Edward Thompson.)

A. If that is the figure, that would be correct, yes.

Q. Now, there is no report for June. The next report we have—is there no report for July?

A. There is a report for July, is there not?

Q. A report for July—if so, I haven't seen it. Could we check that list and see if it is there? I beg your pardon. I stand corrected. There is a report for July. In the report for July, the gross sales are less than in the one for May?

A. That is right, yes.

Q. And the profit is roughly half what it was for the [259] month of May? A. Um-huh.

Q. All right. You testified yesterday that the reason for that was that you had cut off the operation as of August 31, 1952, and that therefore you made adjustment; that the reason for this apparent discrepancy was that this reflected the figures not from June, 1952, to July 31, 1953, but from September 1 of 1952 to July 31 of '53, is that correct?

A. Yes, I would say that is correct, yes.

Q. Now, then, can you find for me anywhere the profits as of August 31, 1953—I beg your pardon—August 31, 1952—sales and profits.

A. You mean August, '52? They are in the old books.

Q. They are in the old books? A. Yes.

Q. And where are the old books?

A. Well, the old books were the ones that Henry had, but we kept duplicates those days in Seattle. We just transferred Henry's figures over to them.

(Testimony of Edward Thompson.)

Q. Now, the only information I have from those reports is this: I have information that there were sales totaling $20,570.10 as of August 31, 1952. I do not have a profit figure for that month since the first profit figure appears in the succeeding month. Since you used that as the cut-off date and undoubtedly used it in the end of the year transactions, can [260] you tell us what that profit was?

A. I can't tell you off-hand because I don't have the figures here.

Q. Can you give us an estimate of what it was?

A. For what period, again?

Q. August 31, 1952.

A. I don't know, but we paid 8,000-some-odd dollars tax on it; I remember that.

Q. Now, I am not trying to confuse you, Mr. Thompson. I am going to ask you to reconsider that answer. I am talking about the period ending August 31, 1952.

A. Oh, yes, it wouldn't be that high. I don't know what that was. I haven't the figure. I would be at a loss to give you anything.

Q. Did you pay a tax on that amount?

A. I think we paid a very small tax.

Q. Have you sought, since you have been on the island, to check with the income tax people to find out just what that profit was you reported?

A. No, I have not.

Q. Have you made inquiry of your office in Seattle?

(Testimony of Edward Thompson.)

A. I did not. Mr. Phelan, maybe, has. I did not know the matter was coming up.

Q. We do, however, have the sales which were $20,570.10, as I mentioned? [261]

A. That is right.

Q. Turning then to July 31, 1953, if these reports reflected the total operation from the beginning date to that period, July 31, 1953, the $91,298.17 for sales would be increased by roughly $20,000, is that correct?

A. Will you repeat that question? I think it is correct.

Q. The report shows sales, $91,298.17.

A. Up to when?

Q. August 31, 1953. A. No, July 31, 1953.

Q. July 31.

A. That is the correct figure, yes.

Q. But if you were to add to that the $20,570.10 for the period ending August 31, 1952, that would be an accurate reflection of the total to that date?

A. Total gross sales, yes.

Q. So it would be something in the nature of $110,000? A. That's about right, yes, sir.

Q. Now, your profit figure set forth as of July 31, according to the report, is $16,077.36, is that correct? Now, is that an accurate figure?

A. I don't remember it and I don't know.

Q. May I have the report—that stack of reports? I am going to show you the financial statement on the report as of July 31, '54, and ask you what the

(Testimony of Edward Thompson.)

profit was for the period of [262] time reflected by that report?

A. It shows $15,091. Is that '54?

Q. No, this is '53.

A. I am looking at the wrong one.

Q. July 31, '53. A. Yes, it shows——

Q. Let me ask, first of all—your counsel has just asked me a question—what period does that report cover?

A. That report is supposed to cover the period from August 31, 1952, through—was this July?

Q. July of 1953, yes.

A. From September 1, 1952, through July 31.

Q. What do you show as profit as of that period?

A. I don't know. This report shows $16,077.36.

Q. Is that the accurate profit?

A. No, we discussed that yesterday.

Q. What is the accurate profit for that period?

A. It would be this plus the amount of inventory on hand. In preparing this profit and loss statement, they forgot to give credit for goods on hand. It shows all the mix purchased and all the merchandise purchased and all the supplies and, of course, that was not right.

The Court: In order to avoid confusion, Mr. Thompson, I wonder if you will not find that the amount of inventory at any time did not run anything like that amount? [263]

A. I beg your pardon?

The Court: The amount of inventory at any one time did not, as a rule, run that high?

(Testimony of Edward Thompson.)

A. No, this is the amount of goods sold.

The Court: That would only bring it to $21,000?

A. Merchandise on hand—let us take a look at the following month's inventories. Inventories would run about $10,000, so that runs about $26,000, roughly.

The Court: Which is still much less because you show as of May 31, a profit of $31,000.

A. Oh, but that had been transferred to surplus, your Honor. You see, at the end of the fiscal year, we transfer the profit to surplus each month and keep an accumulated total for 12 months.

The Court: Then the $16,000 would not be cumulative, then?

A. Only for the period mentioned.

The Court: That period would be what?

A. That $16,000 is an understatement, but that would be the period of ten months—September 1 through July—11 months, I guess.

Q. (By Mr. Bohn): You run September 1, 1952, until the date of that statement?

A. The end of July, so it is 11 months, yes.

Q. What does that report show as your surplus?

A. Here is what the inventory shows—$10,361, so it [264] shows a surplus of approximately the sum of $10,000 and $16,000; it shows $26,326.80.

Q. May I see that? Now, I am looking at this report and there is a notation—the same thing I referred to yesterday—"Copy of what I sent to Dad." You have here a statement contained in this report reading as follows: "Surplus, using your

(Testimony of Edward Thompson.)

figures, $26,326.80." Now, that is the surplus for what period?

A. For the period from the beginning up to the end of that date after paying taxes.

Q. In other words, that is the profit from the first day of operation to and including July 31, less payment of taxes?

A. Less payment of taxes, yes.

Q. Now, as of that moment, you have $26,000 in profit, net profit? A. Yes.

Q. Now, the same report shows a net profit for the period, which would be a different period of $16,000 and some-odd dollars, which you have just testified is inaccurate and you have also just testified that because of an inventory error the profit for that period should be something like $26,000. All right, now, is that $26,000 in profit to be added to the $26,000 in surplus to make a total profit for the period? A. Oh, no.

Q. Well, what is the difference between the figure you have set up for surplus and the figure you have set up for [265] profit?

A. The difference is approximately $10,000 in inventory that we omitted.

Q. Then the surplus or profit, whatever you want to call it, for that period is how much? How much profit did this business earn for that period or any other period?

A. I am just reading from what I see. This is obviously wrong because I can look at the ledger

(Testimony of Edward Thompson.)

and see the charges for mix and merchandise, supplies——

Q. What I am trying to get, Mr. Thompson, is the correct figure. Now, it is apparent that at this stage of the proceedings you elected to change your system of keeping these cumulative reports. I am trying to reconcile them.

A. It wasn't a question of electing. It was because of the corporation. We had to file on corporate returns.

Q. That is assuming you were going to ignore the existence of this partnership?

A. That's it, yes. It shows a total profit to the end of July of $26,326.80 after taxes.

Q. That is net profit?

A. That is right, sir.

Q. That is from the beginning of the operation to that period?

A. No, from September 1—oh, yes, after taxes—surplus after taxes. [266]

Q. So let me—and my terminology may be clumsy and if so I am perfectly willing to stand corrected—but I am trying to find this fact: Then as of that time if you had gross sales for the period to August 31, '52, of $20,000 and gross sales since that time of $91,000, you have roughly $110,000 in gross sales. If you add the profit for the entire period and deduct the taxes you have a surplus and a profit of something like $26,000?

A. Yes, I would say so.

Q. So your surplus figure does not reflect the

(Testimony of Edward Thompson.)

period September 1 to July 31, '53? A. No.

Q. Your surplus figure reflects from the beginning to that time? A. That is right, sir.

Q. But your gross sales figure reflects not from the beginning to that time but from September to that time.

A. The gross sales show—yes.

Q. So the period for which you computed your sales varies from the period you computed your surplus for?

A. Regardless of the year, the surplus is cumulative in the business.

Q. What is the profit figure you are continuing there? You testified that the profit figure was off about $10,000?

A. It seems to be off about $10,000, yes. [267]

Q. If that was off $10,000, wouldn't that increase the surplus by $10,000?

A. No, because it says the surplus "using your figures." Perhaps I checked it and found out something was wrong.

Q. You see what I am getting at?

A. I see it.

Q. I think we ought to have the information. If I am asking the question the wrong way, give it to me in your own words.

A. I am trying to pick it out from the books quickly, but I am unable to do so. You understand I have never made an audit of these books and these statements.

Q. Perhaps my question is not clear. Is there

(Testimony of Edward Thompson.)

any question about what I am trying to find out?

A. What is it again?

Q. Your report shows sales of $91,000 plus for the period starting September 1, '52, and ending July 31, '53, is that correct?

A. That is right, yes.

Q. Your same report shows profit for the same period of $16,000, is that correct?

A. I think it is wrong.

Q. I know that, but that is what the report shows?

A. I think it is about $10,000 wrong.

Q. So, then, following on that assumption, the profit from [268] September 1, 1952, until July 31, 1953, is approximately $26,000, is that correct?

A. Yes.

Q. How do you account for the fact that your total surplus for that period plus the other two and a half months is only $26,000?

A. If I had the figures in front of me I would be able to tell you, but——

Q. Well, it seems apparent—without meaning to be disrespectful—that there is a discrepancy in these figures, and we are trying to find out what they are. In one case you have a surplus for 14½ or 15 months of $26,000; in the other case you have got a profit of $26,000 for 12 months. Now, how do those figures reconcile?

Mr. Phelan: May I ask one question: The taxes —are they reflected in both figures?

(Testimony of Edward Thompson.)

A. No, the taxes are reflected only in this surplus. That is surplus after taxes.

Q. Would taxes change that profit figure for the period from 1 September?

A. I will tell you what might have happened—I don't remember how this thing happened.

The Court: I was wondering if this was possible —whether in setting up the corporate books as of July 31, you took out 50 per cent of previous profit which showed on your corporate [269] books and not necessarily upon these reports?

A. No, sir, it wasn't there. What I probably did do—I haven't the figures here—that $4,000 that we wrote off—I might have written it off on the books in Seattle and claimed it as a deduction in taxes.

Q. (By Mr. Bohn): Which $4,000 was that?

A. Well, between that $42,500 and Joe said we overspent and we reached a figure of $38,000 plus—I may have claimed that as a deduction by the corporation.

The Court: As a loss?

A. As a loss, yes.

Mr. Phelan: May I ask one question: The surplus is after taxes. Is the profit in these reports after or before taxes?

A. No, they are before taxes.

Mr. Phelan: So it's hardly fair to compare.

The Court: You set up taxes as a reserve monthly?

A. No income taxes, no.

The Court: Isn't that the better procedure?

(Testimony of Edward Thompson.)

A. It is the better procedure but that was never done, your Honor.

The Court: So you have no reserve?

A. No reserve for income tax at all.

The Court: In other words, you don't have the answer to these questions? You just don't know?

A. That is right, sir. [270]

Q. (By Mr. Bohn): You don't have the profit for the period ending August 31, '52, is that correct?

A. I haven't the figures available.

Q. You can't tell us what the profit is from September 1, 1952, to August 31, 1953?

A. Yes, I could do that.

Q. Will you please tell us what that figure is?

A. I should be able to do that. The profit and loss statement says for the period, $26,966.70, for the fiscal year ending August 31, 1953.

Q. The figure you can't give us is the profit for the period ending July 31?

A. No, I can't give you the figure for the period ending August 31, the previous year, either.

Q. So, you have on August 31, '53, a net profit for that fiscal year of how much?

A. $26,966.50.

Q. Is that after the payment of taxes?

A. No, that is before the payment of taxes for that period and we paid 8,000-some-odd dollars for that period.

The Court: I am still unable to understand how you had $30,000 profit on May 31, and operated the

(Testimony of Edward Thompson.)

months of June and July at a profit and still have less in August.

A. I think the answer would be at that time we charged off the deduction of $4,000 against Joe Siciliano. That might [271] be the answer; I don't know.

The Court: That would have nothing to do with this?

A. No, I didn't keep the books.

The Court: That was a loss assumed by the corporation exclusively?

A. I had records in Seattle and as they would come in I would check the items in which I was interested and if they were wrong, I would write about them, or if they appeared wrong. Sometimes they were right.

Q. (By Mr. Bohn): Now, I would like to go back to your capital investment in this transaction. Do you have anywhere in these books or elsewhere on Guam, a breakdown of just exactly how much was put into this enterprise by American Pacific Dairy Products prior to June of 1952?

A. We had $43,250 outstanding stock.

Q. Well, what I am trying to get at is just what you had expended on Guam as of that time?

A. There was a statement given Joe; it was $42,000.

The Court: Now, it seems to me that has been answered by the agreement of the parties.

Mr. Bohn: I think that is correct, your Honor. Do you mean the amended agreement?

(Testimony of Edward Thompson.)

The Court: Well, yes, in any event there was $15,000 cash and the assumption of $8,000, plus, liability to the corporation. [272]

Mr. Bohn: Yes, and I have——

A. And that was paid off. The corporation had in $19,000 and Siciliano had in $19,000.

Mr. Bohn: That is correct. The purpose of the line of questioning was to indicate I included in that various expenses and that sort of thing, which we do not complain of.

The Court: Obviously, you have to have expenses.

Mr. Bohn: I do not complain of that figure; I simply want to call it to your Honor's attention.

The Court: Well, it does seem a wide discrepancy when you talk about a building for $15,000 and then talk about $40,000, but that is understandable when you consider doing business on Guam in the spring of 1952.

Mr. Phelan: If your Honor please, I believe that figure included more than the building—supplies and equipment, etc.

The Court: It included supplies and equipment, legal, transportation of Mr. Thompson, everything incidental to getting the business under way, but insofar as the plaintiff and defendant are concerned they have come to an agreement. They came to an agreement as to what this operation was worth and they came to the agreement it was worth $38,000.

Mr. Bohn: That is correct. I will then have no further questions along that line to ask.

(Testimony of Edward Thompson.)

Q. (By Mr. Bohn): Now, Mr. Thompson, I want to run over a few matters that you mentioned in your direct testimony. It is [273] a fact, is it not, that you offered Siciliano 50 per cent interest in this business in January, 1952?

A. No, I asked him if he would be interested in a 50 per cent deal; that I was now convinced it would be a good arrangement for us.

The Court: Now again, Mr. Bohn, I don't want to cut you off, but you are building up an extensive record, and I think everybody is in harmony on these prior negotiations. In other words, your course is very clear. First, Siciliano acted as a friendly agent while the corporation was getting started in Guam. Secondly, negotiations whereby he was to take a 20 per cent interest in the corporation, not necessarily any management, but buy a 20 per cent interest, and finally, a determination on the part of Mr. Thompson that the best operation out here was to contemplate a 50-50 proposition with Siciliano. That is correct, Mr. Thompson, isn't it?

A. That is what I understood. It is in the record. I think I have said that.

The Court: In other words, it is perfectly clear at all times that the corporation wanted Mr. Siciliano's interest in this activity.

Mr. Bohn: Very well, your Honor.

Q. (By Mr. Bohn): Now, Mr. Thompson, you have testified that this corporation refused to ratify this agreement. Is that the substance of your testimony? [274]

(Testimony of Edward Thompson.)

A. No, sir, I said in October of '53, they ratified on condition that Mr. Siciliano get back to Guam within 60 days. I think the record speaks for itself.

Q. Now, this corporation then, neither ratified nor failed to ratify this agreement for the period starting in June and ending in October, is that correct?

A. Well, for the period starting in June is not quite right, because I'd have to have the paper before me, and it didn't arrive until the latter part of July, so for the period from July until October, they did nothing, but I am afraid if they had done anything it would have been adverse action.

Q. You are now stating then that this was never approved by the corporation during that period of time? A. Until October.

Q. Until October, 1952?

A. It was approved in October, 1952, provided Siciliano got back to Guam.

Q. During all this time the matter was in suspense?

A. Yes, hoping he would get back to Guam.

Q. In suspense?

A. Yes, we wanted him back there. We didn't want to break off negotiations.

Q. Regardless of what you wanted, you signed the contract in June, and it was simply in a state of suspense until October? A. Yes. [275]

Q. Now, did you write a letter to Lyle Turner in October, 1952, about this matter?

A. I think I did, yes.

(Testimony of Edward Thompson.)

Q. Do you recall what was in this letter about ratification?

A. I don't recall; I haven't those documents before me. I haven't seen them but I wrote him and told him I thought I could have it ratified.

Q. Isn't it a fact you told him there never was any question about this agreement being ratified?

A. What is the date?

Q. I am going to ask——

A. I wouldn't say I said that without reservation or without qualification. I might have said it but with reservation or some qualification. It is a cinch that if Joe Siciliano continued to be absent from Guam we would not like it.

Q. Whether you would like it or not isn't the question. I am asking if you told Mr. Turner.

A. I can't remember; it would be a matter of opinion, not an action of the board, if I said so.

Q. Let me read you something and ask you if this is your letter: "Last Monday"—dated October 9, 1952—"Last Monday my associates, Herbert Little and George Henrye, while discussing other matters in which we are interested, formally approved that agreement which I made with Joe Siciliano last June on Guam. [276] There never was any question about not approving the agreement, but I purposely refrained from having it formally approved ere now, because I thought it possible that the lack of approval might somehow some time help Joe in his troubles." Do you stand on that now, Mr. Thompson? A. I did say that.

(Testimony of Edward Thompson.)

Q. Did you recite that?

A. I did because I could have forced the board to ratify it.

The Court: Now, just remember that you testified the board of directors in October refused to ratify it.

A. No, sir, I did not. I said on condition. They approved it on condition.

The Court: Now, this letter——

A. Was written afterward and at the time it was written I assumed Joe would be back on Guam within 60 days.

The Court: It doesn't say that. The letter says you had an informal meeting with the directors and they ratified it, not conditional.

Mr. Phelan: The resolution is in evidence.

The Court: The resolution is in evidence, so is the letter. This letter is being introduced for the purpose of impeaching this witness. Now, if this Court is being deceived as to when the corporation took action on ratifying this agreement, it wants to know about it. [277]

Mr. Phelan: Well, I think the ratification was prior to the letter, which is in evidence, certified to by the secretary, and determines what the corporation did.

The Court: There is no evidence before me that Siciliano or anybody else ever received any information concerning this agreement and its ratification until this letter was brought out.

(Testimony of Edward Thompson.)

Mr. Phelan: I think it has been admitted in the pleadings that he received notice of that.

The Court: This notice?

Mr. Phelan: A copy of that resolution.

The Court: I want to see that letter. Now, this is perfectly clear and I wish that the defense would stop this fiction that the agreement was not known to the directors and ratified by the directors.

Mr. Phelan: If it please the Court, in paragraph 5 of our cross-complaint, we referred to that resolution of the board of directors on October 6, 1952, and in reply to our cross-complaint and counterclaim, the defendant admitted receiving that resolution.

The Court: It doesn't make any difference about the resolution. Your letter says that it's pretty much of a fiction. If they want to date it back or date it ahead or so forth—there never was any question about the ratification. Now, the defense cannot contend—they never had any bona fide contention in October of resigning. Has he read the [278] letter?

Mr. Phelan: All I can say it is what the board of directors put in their resolution.

The Court: Well, you have the president of the corporation here. Let's forget about this fiction. I think that letter should be put in evidence.

Q. (By Mr. Bohn): I will ask you, Mr. Thompson, if you signed this letter to which we have just referred? A. Yes, I signed it.

(Testimony of Edward Thompson.)

Mr. Bohn: I will now offer this letter as plaintiff's next in order.

The Court: Without objection, it will be received as Plaintiff's Exhibit 7.

Mr. Phelan: I would like for the record to object to the reception of it.

The Court: On what ground?

Mr. Phelan: On the ground it cannot be binding upon the corporation or the defendant. It is a personal letter written by the witness and it is outside the scope of his authority as president of the corporation.

The Court: Your objection will be noted.

Mr. Bohn: I have no further questions of this witness.

Mr. Phelan: I have a couple of questions.

Redirect Examination

By Mr. Phelan:

Q. Mr. Thompson, based upon the figures on profit, is it [279] possible for you to determine from those books that are here and available what the profit was period by period up to any definite period?

A. Not prior to 1953, July, because we haven't the books here. We have records in Seattle, but they are not here.

Q. I ask you, Mr. Thompson, did you write any other letters either to Mr. Siciliano or Mr. Turner concerning the return of Mr. Siciliano to Guam?

A. Oh, I wrote a number of letters to both, yes.

(Testimony of Edward Thompson.)

Q. Did you get a reply?

A. To Turner's I got maybe an occasional reply, but I was under the impression that Siciliano would be back before the end of 1953, that the case was practically settled.

Q. Where did you get that impression?

A. I got it from conversations with Siciliano and Mr. Turner. I think Mr. Turner wrote it. I am not quite sure about that. That is why I told him we thought 60 days would be ample, but if not, we could get the board to extend it.

Mr. Phelan: I have no further questions.

Mr. Bohn: No further questions, your Honor.

The Court: Just a moment, Mr. Thompson.

A. Yes, sir.

Examination by the Court

Q. Would it be correct to say that this operation, during the management of the Siciliano group was more successful than [280] under Norman Thompson's management?

A. Yes, because conditions on Guam have changed quite a bit, your Honor. Conditions are very bad now, your Honor. They have dropped off. We have had three different drops and competition is much greater now.

The Court: That would have no bearing on the relation of profit to gross?

A. Yes, it would, because the gross profit to sales is 65 cents to the dollar, but our rent, insurance——

(Testimony of Edward Thompson.)

The Court: I am thinking in terms of equal monthly sales.

A. Yes.

The Court: In other words, if you sold $12,000 during the month of March, and there was a profit of 33 per cent, and you sold $12,000 during the month of August in '53, and there was only a profit of half that much, you would think that the second management wasn't as efficient as the first, wouldn't you?

A. Or I would look for extraordinary items. For instance, we might get a big bill for legal expense or travel.

The Court: Yes, I appreciate that. We are thinking pretty much in terms of averages here. Now, you have testified that you put—what was it—$26,000 into the new corporation?

A. No, sir, $17,500. There is the $5,000 open account. It could be collected tomorrow.

The Court: You put $17,500 and that was 17 per cent of the outstanding capital? [281]

A. Of the outstanding capital.

The Court: After you had done that, do you recall how much money you had left in the corporation?

A. No, sir, I do not.

The Court: What I am wondering about actually is whether you used part of Mr. Siciliano's money to invest in that corporation?

A. I haven't the figures before me and I don't know, your Honor.

(Testimony of Edward Thompson.)

The Court: In any event, you never made any formal tender of any amount of money to Mr. Siciliano?

A. No, at that time we were prohibited. I left that to Mr. Little, who was secretary and counsel for the company. He knows more about those things than I do.

The Court: And as far as you know at this time, during the period the Siciliano interests were operating the Dairy Queen, all monies over and above local expenses were sent to you in Seattle?

A. Or accumulated here and, of course, the money that was sent to me was spent legitimately and duly accounted for.

The Court: Yes, I am still not quite clear as to the amounts. Have you tabulated the amounts?

Mr. Bohn: Yes, I had the exact figure. It was about $118,000, as I recall.

The Court: Now, that is what throws me off. This is the [282] gross sales?

A. The gross sales were $199,000.

Mr. Bohn: This was spread over the entire period from June 22 to November, or something, of '54?

The Court: I thought you were talking about money that Diza had sent?

Mr. Bohn: No, not the total amount. I have the exact figures here.

Mr. Phelan: Does that include the $15,000?

Mr. Bohn: Yes, in that figure was $7,500 which went back to Mr. Thompson, to which he was en-

(Testimony of Edward Thompson.)

titled as a debit. During the period of Siciliano's operation, Mr. Thompson was sent money in two forms: (1) by checks; (2) by bank drafts. I do not know the form which he was sent money since that time, but generally speaking, from my brief observation of the books, starting in September, '53, wasn't it?

The Court: It isn't material as long as I understand it includes more than the amounts——

Mr. Bohn: It covers the entire amount sent in by Diza.

Q. (By Mr. Bohn): Now, Mr. Thompson, before you and Siciliano entered into this agreement, you must have had some discussion as to how Siciliano was going to perform his managerial function?

A. I don't think we had a detailed discussion on it.

The Court: Did you understand he was going to have to [283] resort to the use of employees from his organization?

A. Yes. I understood he was going to have his employees in the store. We fired the Guamanians and put in his Filipinos.

The Court: How about the bookkeeping?

A. I don't think that was discussed at that time.

The Court: You left that up to Mr. Siciliano's discretion?

A. I think we did. The main thing was to manage the project.

The Court: Now, as an expert on this type of operation, Mr. Thompson, is it a fair statement that

(Testimony of Edward Thompson.)

as of the time the corporation took over this operation it had been conducted reasonably well and successfully?

A. Very successfully. The only two objections I had were I didn't get reports often enough, the reports were usually delayed, and we did not get those stores built. If Joe had been here they would have been done and, furthermore, if Joe Siciliano had been here, we wouldn't be hooked in that Guam Frozen Products either. He would have gotten a better location for us.

The Court: I think that clarifies this matter considerably. Now, you haven't put on any evidence as to your cross-complaint yet.

Mr. Phelan: I want to call Mr. Norman Thompson to identify the rest of the books, too.

The Court: Yes, would you appreciate a recess now? [284]

Mr. Phelan: Yes.

The Court: Very well, we will take a 15-minute recess.

(The Court recessed at 2:50 p.m., February 15, 1955, and reconvened at 3:10 p.m., February 15, 1955.)

Mr. Phelan: Mr. Norman Thompson.

MR. NORMAN THOMPSON

called as a witness by the defendant, was duly sworn and testified as follows:

Direct Examination

By Mr. Phelan:

Q. Will you please state your full name, occupation and residence?

A. Norman Thompson, P. O. Box 725, Agana, Guam, manager of Dairy Queen.

Q. Mr. Thompson, how long have you been manager of Dairy Queen?

A. Since April 22. It might have been shortly after that, but it was in April, 1953.

Q. Now, Mr. Thompson, are you the custodian of the books and records of the Dairy Queen?

A. Yes, I am.

Q. We have certain books that have been introduced in evidence already that were turned over to you. May I show this witness the exhibits as I want to introduce the other ones and I want him to know what we have got in? The big book, Cris. [285] Just the books of record. This has been introduced as a book of record. The monthly reports have been introduced, monthly statements and a voucher file. Now, when did you receive the records of the Dairy Queen?

A. May, probably around the 10th of May, 1953, when he gave them to me.

Q. What did they consist of?

A. This journal, a ledger, a letter file, some cash vouchers, some pamphlets from the National Trade

(Testimony of Norman Thompson.)

Association, meaning nothing, some letters from Mr. Edward Thompson, maybe something else, but I can't think what it is at the moment.

Q. Did you subsequently use other books in the business? A. How do you mean? Before this?

Q. After that.

A. Oh, yes; I think we started in July of 1954. We discontinued using this except for a sales record and started using another journal, a bound one, another ledger, journal vouchers, another system entirely than this.

Q. Now I may have something here that is not part of the corporate records. Will you please look at this and sort out those that are not part of the corporate records? I picked up a couple of files I am not sure of.

A. These are duplicates of these. They are the corporate records but they are duplications. This is just carbon copies of these. [286]

Q. Now, will you, one by one, identify those, please?

A. This is the ledger of American Pacific Dairy Products. This is the reconciliation of cash disbursements from the Seattle office with the receipts that were paid. This is our journal voucher file of American Pacific Dairy Products starting in August with a balance from July carried forward.

Q. The balance from July was carried forward in that book? A. Yes.

Q. May I ask you a question, Mr. Thompson?

(Testimony of Norman Thompson.)

Are any of these books that have to be referred to daily in the business?

A. Are these going to be introduced?

Q. I think they should be but I want them to have access to them to keep the business going. I don't want to put the business out. This is the journal? A. The journal.

Q. The ledger?

A. Yes. The reconciliation of cash disbursements to the Seattle office.

Q. Now it seems to me we had a couple of other things introduced here.

The Court: You have the loose journal entries.

Mr. Phelan: Yes; has the court got those or has the clerk? What is that you want?

The Court: The loose journal entries.

Mr. Phelan: And the reports. This is the next one, Cris, [287] and this is the next one.

The Court: I have the reports here.

Q. (By Mr. Phelan): Now these are Defendant's Exhibit H and Defendant's Exhibit G. Do they cover any period after you assumed management? These reports cover the period right up to a month or so ago.

The Court: I don't show that late. Well, the top one will show.

Mr. Phelan: Yes; they run up to 1954.

A. I got the books one and a half months, one month and eight days after I came in the latter half of April so if you say my management started

(Testimony of Norman Thompson.)

the day I arrived on the 22nd of April, you have May in there?

Q. This covers up to May. It runs up through April and into May? A. Yes.

Q. Defendant's Exhibit G?

A. The same thing on this?

Q. Yes.

A. Clear up through the month of—we used the old journal of the Dairy Queen which we are now using solely for cash sales of the two stores, so it goes up to January 31.

Q. You keep a record of cash sales in that one?

A. Yes, but what it was originally intended for was a journal, Simplex journal system. We stopped using this back [288] in July. We discontinued using this back in July.

Q. 19—— A. '53.

Q. Mr. Thompson, these monthly reports cover the entire period up to and including, I believe, the 30th of November, 1954. They were compiled from both sets of books?

A. Yes; just glancing, I think they do. I think they are in numerical order by months. I recognize mine and I imagine the ones before that or just prior—the early ones are signed by Henry Diza, so I imagine they are his.

Q. Which is the first one you signed?

A. Well, I didn't sign but I can tell mine. I don't sign these so I can't really tell you where mine started until I got my typewriter, but some of these were done in Pacific Bakery; I couldn't

(Testimony of Norman Thompson.)

tell. I can tell my type because I have the large type and these other reports, like February, 1952, were not done on my typewriter, but I couldn't swear to it. I would have to look at the working papers.

Q. Now, when did you first see these records?

A. These?

Q. Yes.

A. I think I came on April 22, 1953. I didn't do anything that day. April 23 I just glanced at them and I think I started working at them on the 24th.

Q. Where were these records? [289]

A. Various places throughout the office. The records you are showing me were in the office of Pacific Bakery. These were hither and yon throughout the office. None of these I did. This is just redoing these. No, it isn't—these are just journal vouchers. I did some of these so they couldn't have been in the office when I came.

Q. What months did you do in those? Are those journal vouchers?

A. Yes; starting in January in this one. I think that's in here. I started writing on the journal from my books by January 16, I think. I found a cablegram dated January 16 and put it in the books that date so I completed the January report.

Q. You completed the journal for the month of January? A. Yes; then I went on.

Q. After January, who posted the books?

A. I continued to post from that date except

(Testimony of Norman Thompson.)

for the month of July when Dad was over here. I did January, February, March, April, May.

Q. So you tell us you came here toward the end of April and went back and posted in January the records of the business? A. Yes.

Q. May I ask you were any of the records posted before your arrival here?

A. Well, you can't post a record until you write up a journal voucher, and I was planning on spending some time in the [290] States but Dad hadn't received reports so he sent me out.

Q. You can't prepare a monthly statement until you get the journal finished? Where did you derive the documents from which you got the information to post?

A. Well, January—he had them in a folder, as I remember. February, some were in a folder, some were in envelopes. March, April, they were in envelopes on top of a filing cabinet. Some were attached to Pacific Enterprises' records. Journal vouchers—most of it was done in cash and some of them were bought for Dairy Queen at the time he bought things for Pacific Enterprises so I never did get those.

Q. You never did get those vouchers?

A. No; Henry Diza, the accountant at that time, said he would keep it and put in a note. I think he put in a note for cash. In one case I remember he did. I won't say he did many times but one case particularly because I asked him for the cash

(Testimony of Norman Thompson.)

voucher and he said he needed it. I said that was no way to keep books but I let it go.

Q. Now all these records were kept then up at the Pacific Bakery?

A. Yes. You mean at the time I arrived?

Q. Yes. When did you first go down to the store?

A. The day I arrived. About three hours after I got off the plane, I think.

Q. What time was that? [291]

A. I think right around noon or 1:00 o'clock.

Q. Would you describe conditions at the store?

A. I didn't look at it that day; I just went in.

Q. When did you first go to work?

A. I went the day after that. I was still unfamiliar with the help. I really didn't stop work at the store. I was anxious to get these reports finished so the store was open the night of the 23rd or 24th, I think. The next day I started working at the store when I got the key to the cash register and the safe from Henry. The trouble was at the time he was busy on the farm. Mr. Siciliano's books were behind on that, he said, so I didn't start working at the store but I got the two months' books out. I was down there the latter half of April at the store.

Q. Would you describe the condition of the store?

A. It was dirty. It wasn't the boys' fault. They are ignorant of a lot of what is necessary to keep the bacteria count down.

Mr. Bohn: I am going to object to the conclusion

(Testimony of Norman Thompson.)

of the witness. The question was, what were the conditions. I thought the answer was, "It was dirty," and anything further I ask to be excluded as not responsive to the question.

Mr. Phelan: I think it is responsive.

The Court: Now, what is the purpose of the question?

Mr. Phelan: One of our matters here is management. I [292] would like to know how this business with its equipment was—its standard of sanitation.

The Court: I think he is entitled to inquire as to what the condition of management was.

Mr. Bohn: I didn't intend my objection to reflect an objection on that point but only that the answer of the witness encompassing a judgment on various and sundry matters was not responsive to the question.

The Court: He said it was dirty. Let's go on from there.

Mr. Phelan: I can go into the details.

Q. (By Mr. Phelan): First of all, Mr. Thompson, how long have you been familiar with the management of that type of store?

A. 1948 I went into it with my father.

Q. Have you worked in a store?

A. I started at the bottom.

Q. Are you familiar with the equipment?

A. Very.

Q. Where did you get your experience?

(Testimony of Norman Thompson.)

A. I started at Olympia, Washington, June, 1948, I think.

Q. Have you held all the positions in the store?

A. Yes, I have.

Q. Now, you said in response to my question that the store was dirty? A. Yes.

Q. Will you describe what you mean? [293]

A. Well, ice cream making out on Guam—we have a vat to reconstitute the powdered mix with the mix we use in making ice cream. It is in a stainless steel vat as in the case of milk equipment. It had a large head gasket. Well, the boys didn't have a wrench to fit this since a crescent wrench would have to have a big head on it since there is no pressure behind it. Well, I asked him where the wrench was to take that off. He said, "We don't have a wrench." I said, "How do you get it off," and Tony said, "We don't take it off." I said, "What about the mix inside?" He said, "Oh, we wash thoroughly around here." So I finally dropped it that night and went to the blacksmith shop to have a wrench made to fit the nut, took it off and there was green mold enough to get under my fingers all around. I looked at Tony and said, "Do you call that clean?" He shook his head so I cleaned that and around the walls where they mopped every day. Instead of going the length of the walls, they mopped up to the walls so I had three boys spend two nights with a wire brush scraping out the dirt and crud that was four inches out from the wall into the latrine and sink. Some was about two feet

(Testimony of Norman Thompson.)

out from the wall so we scraped that off with a wire brush and those are the two main points I remember what I call a dirty store. The windows were clean.

Q. This stuff on the floor—do you remember what its composition was?

A. Whatever was spilled on the floor. It takes five months [294] to accumulate that at least. Whatever you spill—mix, topping or anything. Whenever they mopped it tended to build up on the side. It wasn't dust.

Q. How about the reefer holding cabinet?

A. Well, the walk-in cabinet when I got there was about 68. There wasn't a thermometer on it so I bought one and put it in. It was just about as warm as the weather, I thought. I tested it and it was 68. When we opened the business we brought out about two, but when I opened up the next morning it was 68 degrees in there. To keep mix from having a high bacteria count, unless it is in a vacuum, it should be down around 30 or 34 degrees so I asked him if the door was missing the rubber to keep the cold in. I walked up to Henry and I said, "The box isn't very cold." I didn't know any reefer men on the island; I had just been there about three days at that time. Nothing happened and the following morning we were taking a bacteria count and a Navy Chief came down and said we had a high bacteria count. I understood why because of what I had seen. So Henry came down and put a strip of canvas around the door and fixed the hinge so it would shut properly, but he didn't

(Testimony of Norman Thompson.)

put enough freezone in the compressor to chill the box. Dad gave me the reference of a man he knew, but he wasn't a refrigeration man and he wasn't anxious to do it, so I went to another man. There was a leak in the tubing which this other refrigeration man didn't fix, so I went back to the first refrigeration man my Dad had [295] suggested and he fixed the box pretty well, and we got it down to about 50 and by changing the expansion valve we got it down to 40 during the day. Even then when you opened up the large door—the store was not air-conditioned—the air would warm it up. Finally we changed motors and by using the compressor at night we got it down to 50 degrees. Naturally, the mix cannot chill as fast as the air, but we could chill the mix down at night to about 38 and if you open the door during the day it will go up, but not much. In other words, it takes longer for the mix to warm up than the air.

The Court: I want to clear up one point, Norman. When you speak of mix you are speaking of the ice cream already prepared?

A. No, your Honor; I am speaking of the mix when it is reconstituted from the powdered mix to raw mix before it goes in the freezer. So far I am in the back room of the store getting this mix. It is just like taking powdered milk.

The Court: It ceases to be powdered?

A. We add water to it at this point and then it goes to the freezers in the front room.

Q. (By Mr. Phelan): Now, will you tell me

(Testimony of Norman Thompson.)

about this bacteria count you said was being taken at that time?

A. Well, the chief came down with an Air Force corporal—I think his name was Chief—I am not very good at remembering names—but he came around every week for a long time. So he [296] said, "You have got a higher bacteria count here than you have had for a long time."

Mr. Bohn: I object to this gentleman testifying to what somebody else said. It is hearsay. We have no opportunity to cross-examine the individual.

The Court: Well, I think that is hearsay so far. What, of course, the witness may testify to is his own knowledge. I presume he had tests made.

Q. (By Mr. Phelan): Did you ever see the bacteria count or report of it?

A. Yes, I saw the report.

Q. The laboratory report?

A. Yes; I think the Air Force or the Navy was going out and picking up samples and the Government of Guam was taking it with the aid of another serviceman at the Guam Memorial Hospital and they continued doing that for some time. Then they stopped doing it and now it is strictly the Government of Guam.

Q. The Government of Guam regularly makes those tests now? A. Yes; now they do.

Q. Now, just for the purpose of the record, may I brief your report as to what I think the procedure is and will you correct me? The mix comes in a powdered form. It is mixed in a certain way with

(Testimony of Norman Thompson.)

water, chilled and agitated so it won't separate and put into another machine for freezing with flavor in it. Is that the process? [297]

A. Almost. You put the water in first at night so the water will be cold or cool which you add the mix. Otherwise you would already have bacteria so you chill the water first. We chill the water, add the mix, then add the flavoring.

Q. Now, when you came to Guam, where were your supplies stored? A. Pacific Bakery.

Q. Would you describe that? Did you inspect that?

A. Not for some time I didn't. I think I went up there the second or third week. They had the room locked so I couldn't get in until I knew some of the boys. I only knew Henry at that time.

Q. When you got in would you describe the condition of the materials up there?

A. Well, they weren't rotating the containers. I found——

Q. Containers, you say?

A. Yes, sir; you see when supplies come in you pile them on top and then you get them from the top and judging by the number and conditions of the boxes in the far corner when I finally did move it out, it had been there from the time we opened and I guessed it had been there much longer than the stock in front.

Q. Let me ask you this, Mr. Thompson: This prepared mix that comes out from the States in

(Testimony of Norman Thompson.)

drums is that a staple product or has it a period of time in which it should be used? [298]

A. Oh, it is considered staple, but it has a period of time—approximately six months not in direct sun, but if you stored it in here, it would last maybe six months.

Q. Now, at the end of six months, what happens to it? Does it get unfit for use or change or what?

A. I have never kept a drum six months to find out, but I think it would turn sour, the same way as malt. It has the same ingredients in the base and malt will turn sour if you leave it unsealed and out in the open.

Q. Now, when you came to Guam and took over the books, would you describe the way cash was being handled, of your own knowledge?

A. Well, I came to Guam and the cash was kept in a safe besides Henry Diza's desk in the office of Pacific Enterprises.

Q. How big a safe?

A. Oh, about three and a half feet—I am guessing. I haven't seen it for a long time. Maybe it was three and a half by three feet by three and a half feet.

Q. It was being kept there. Was that just Dairy Queen cash or what?

A. Oh, no; I saw him counting cash and putting it inside and I didn't think anything of it the first day I came. I thought, "Boy, that was a lot of cash." There was a lot of it. Joe Meggo would bring

(Testimony of Norman Thompson.)

it from the Talk of the Town at night. He just kept it in there and I found out after I reconciled [299] the bank account and cash on hand that our money was in the safe also.

Q. How much was turned over to you?

A. I don't remember. I made a deposit the first day but I can't remember the figure. It was a couple of thousand dollars. The next day I deposited 4, 5, or $6,000. The next day I must have taken out 6 or $7.000 out of that safe; I am guessing.

Q. The first one or two deposits in the Bank of America would represent the receipts for those days less the cash taken out for change plus what was turned over to you?

A. I don't follow you.

Q. You said you made a couple of deposits?

A. Yes.

Q. What did that represent? The money that was in the safe?

A. That represents the money in the safe plus the sales. When I came here they hadn't deposited for several days so it would be that money—some of the money I found in the safe—or maybe it was just the money before that second day I started working on the reconciliation and there was some money plus the sales of two days. I was working on the books.

Q. You mean Henry Diza didn't turn over to you all the money of the Dairy Queen?

A. No; because we were reconciling the books. It took him two days looking for receipts. I was

(Testimony of Norman Thompson.)

working on the books to find out how much we were short. [300]

Q. Do you know whether or not Mr. Henry Diza had that money segregated in the safe?

A. I don't know. I don't know how he was handling that. He might have or he might not. I didn't watch him to see how he was drawing it out.

Q. You got here when?

A. About April 22.

Q. And I believe you told me you started posting the records of Dairy Queen back in the first part of January?

A. The journal when I came—the sales were written up by Henry—I believe Henry or somebody in Mr. Siciliano's office—up to the 17th of April so I started on the books when I arrived on the 22nd.

Q. That is what you said?

A. I must have started working in the office on the 24th or 25th. I started in the office working on the sales.

Q. Up to the 17th you said there was a record of daily sales? A. Yes, in the book.

Q. Now, what is that? What records did you start posting from some time in January?

A. Those were the sales. They were in there but none of the payrolls. They weren't in and the tax wasn't shown. I mean the entries in the journal—vouchers hadn't been posted. In February some of the invoices hadn't been opened or letters [301] yet. One or two in March. I remember he was open-

(Testimony of Norman Thompson.)

ing letters, pulling out invoices that Dad had sent him.

Q. That had not been opened?

A. (Shakes head.)

Q. Now, some time during the period 24th or 25th of April to the end of the following week, these reconciliations were made and funds turned over to you and you deposited those funds in the bank?

A. Yes; the first deposit I made was around the 27th, I think. Somewhere around there; I would have to check.

Q. Now, the bank book would correctly reflect that?

A. After the time I came here it would, and I believe it would before.

Q. Would reflect the deposits? A. Yes.

Q. Now, you started to go to work down in the store a couple of days after you got here?

A. Yes.

Q. Was the cash register being used and equipped to use tape?

A. No; it was not. I think they took a reading off it at night by taking a tape. It wouldn't total. They would put a slip of paper in there and hand operate it down there to get the total. On the automatic register that you see now the daily sales are rung up and given to the customer. The roll of tape [302] was not in the cash register but at the end of the day he cut a piece of the tape, put it in there and took the total off it.

(Testimony of Norman Thompson.)

Q. Was that just——

A. It was a daily total, the cumulative sales. It would do that but only up to $999.99, I think.

Q. You could clear the machine? A. Yes.

Q. Were you furnished with any of those reports?

A. I asked Henry when I came here. I asked where the sales from the 17th, 18, 19, 20, 21 and 22 were. He told me they were around somewhere. He couldn't find them. He was taking a daily inventory at that time, meaning that any supplies in the back room which were brought out to the front room, the boys would mark them down on a piece of paper and at the end of the day the totals should agree with this. I said, "What about those daily inventories, we can check them on that." He didn't have them and I had so much money here in my hand and I was missing four or five daily sales so I gave the money between those days until I ran out of money in my hand. He couldn't find any records so I just took the amount of money and spread it out between those four or five days of sales.

Q. Those were on the daily sales. Now, what other vouchers did he use—did he make available to you for posting that you did for that period before you came to Guam?

A. Oh, I think he gave me enough. I couldn't put anything [303] in the books I didn't have a record for. He showed me that some of these were attached to Pacific Enterprises books, I believe. It

(Testimony of Norman Thompson.)

has been a long time. I saw everything I put in these books as far as receipts.

Q. And you can tell which are your entries because they are in your handwriting?

A. Oh, yes.

Q. And for everything in your handwriting he showed you a voucher?

A. Yes; he showed it to me.

Q. Now, with the exception of the daily sales, cash receipts, which you said for several days you had no reading—— A. Yes.

Q. The daily sales were posted, you testified, up to, I believe, the 16th or 17th of April?

A. Well, I know they were posted for the 17th of April. I can see his handwriting. They were posted through the 17th.

Q. Now the other records in that book—were they all evenly posted up to a certain day in January or to varying dates? Can you tell?

A. The entries in the journal were posted by Henry up to the 16th of January, and, of course, the sales.

Q. So he had posted all accounts——

A. He had made journal entries up to the 16th of January, to the 17th and he had kept a record of cash receipts of the store, [304] of the gross sales.

Q. Now, would the cash receipts and gross sales differ? A. Cash receipts?

Q. Would that represent anything except cash that came out of the cash register?

(Testimony of Norman Thompson.)

A. No; he never entered any of the wholesale accounts we had. In fact, he didn't even send them a bill, I think, until I arrived, but that was the only other income of cash we had so the cash receipts and the amount of sales would have been strictly out of the cash register.

Q. Now when you came to Guam I understand that there was an "L" on the building of the Dairy Queen, an extension? A. Yes, sir.

Q. Would you describe that extension? Give us the physical layout.

A. It's attached to either side of the Dairy Queen store, the original Dairy Queen store as I saw a picture. It's 12 feet in width, maybe 30 foot long—31 foot—I measured it once. And it was divided down lengthwise by a partition with a large door at the farthest corner. Then on the back—that you cannot see from Marine Drive—in the center of that extension there is a double door. They had serving counters cut out similar or exactly to the type that are in the original store. Above that was one pane of glass, above each of the two serving counters, up to the wall in the same design as Dairy Queen store [305] with frames for large windows but the windows were not in. It has a cement deck and it is made mostly out of reefer panels. The sales room has acoustic tile and the back room has —oh, I don't know—some other type of material. It is not acoustic tile—plyboard or something like that—gypsum board.

(Testimony of Norman Thompson.)

Q. Would you describe the plumbing and electrical installations in there, if any?

A. The electrical installations amounted to 1, 2, 3, 4 ceiling lamps, light sockets, I mean. There were two switches and about eight outlets, all of which were 110 volts. They had a 30 amp. fuse box in with about six fuses in it. I think six or eight fuses. Plumbing consisted of two pipes coming out of the wall at about sink height with drain pipes sticking out. The hot water pipe and cold water pipe were plugged off. Then in back of this extension in the back room there is an iron pipe, two inches in diameter, an inch and a half in diameter, coming out of the floor about three feet, four feet, and I haven't found the use of that yet. I am using it to hang things on. It is still there, but I think it is connected with the plumbing in some way. The plumbing pipe goes out that way at the same angle, but I don't know what it's for.

Q. What type of floor?

A. Concrete floor, cement, which I remember was very absorbent to water. It would rain in there and it would just absorb the water—the cement [306] floor.

Q. It was porous? A. Porous.

Q. And this extension was not out flush with the front of the building?

A. No; it started about where—speaking of the original store—where the sales room back wall started. The extension came out just about there.

(Testimony of Norman Thompson.)

Q. So the front part of the store is recessed that much back?

A. Yes. It almost started behind the sales room.

Q. Now, Mr. Thompson, when you became familiar with these books was there anything in those books reflecting that addition to that building?

A. No; I went through them a couple of months before I came here and I have never seen anything. It doesn't take long to go through the books, but I have found nothing unless it is charged off to PCC or something, but I haven't found anything.

Q. You found no reference to that extension in the books? A. No.

Q. Did you ever come across any vouchers with respect to that extension? A. No.

Q. Now, Mr. Thompson, you are now keeping the books of the Dairy Queen? [307]

A. Yes; I am.

Q. How much time does it take you in the course of a month to keep those books?

A. If I started off and had to do it, I could do it in eight hours from the time the month closed if I didn't do anything until the end of the month and I had to do it, I could do it in eight hours—that is to the final typing.

Q. Does that mean posting every necessary entry during the month?

A. Yes; if this type of book was continued in use, I could do it in about an hour and a half. We have a more complex bookkeeping system than they had.

(Testimony of Norman Thompson.)

Q. Now, from your testimony, Mr. Thompson, you stated that the journal vouchers were not completely posted after the month of December, 1952? You had to make some entries in January, '53, is that what you testified?

Mr. Bohn: I don't want to interrupt but it seems to me we have gone over this several times before. The dates were perfectly clear as to this.

Mr. Phelan: I am not trying to repeat the testimony. I want to get started on another question.

The Court: What was your question, Mr. Phelan?

Mr. Phelan: That the journal vouchers were not complete starting with the month of January, 1953, and that he posted from there on. I want to be sure I am not asking him the wrong [308] question.

The Court: Well, I think we have to assume that the evidence is not in dispute as to the accuracy of his reports up until the time that Mr. Thompson took over.

Mr. Phelan: Well, I am trying to arrive at the first report that had to be prepared by Mr. Thompson. I think the first month he did any work on the books was January, 1953.

The Court: Now he couldn't have prepared the report, of course, prior to April of 1953.

Mr. Phelan: He has testified already that he had to prepare some of the statements before that and I want to, by process of elimination, find out whether the first one was the January statement or the February statement.

(Testimony of Norman Thompson.)

The Court: We are talking about two different things. These are reports?

Mr. Phelan: Yes. The reports had to be based upon those books and what I am trying to find out is the last complete month a statement could have been prepared without him doing any posting, because he didn't prepare that statement.

The Court: Well, I don't see what purpose it would serve if they weren't posted. They are posted now.

Mr. Phelan: They are posted now. I am trying to get him to identify the first statement that he, himself, actually prepared. He would have knowledge of that statement himself.

The Court: Well, why don't we ask him [309] then?

Mr. Phelan: I am trying to.

Q. (By Mr. Phelan): Which was the first month for which you prepared a statement?

A. January, 1953, was the first financial statement I prepared.

The Court: January of '53?

A. Yes, your Honor.

Mr. Phelan: Will you find it for me there?

The Court: That would be for the statement ending December 31 or January 31?

A. The statement ending December 31 was prepared, your Honor, when I arrived on Guam.

The Court: And you prepared all the statements from that time forward?

(Testimony of Norman Thompson.)

A. Yes, your Honor. Here is your place. That is what was done—this is what I have done.

Q. (By Mr. Phelan): So the statement ending for the calendar year 1952 was prepared by Mr. Diza?

Mr. Bohn: If your Honor please, I do not understand that there was any substantial conflict at the time of testimony regarding these statements nor as to their accuracy.

The Court: I think what Mr. Phelan is trying to bring out is that even during the period from January, at least, to April that you hadn't done the job.

Mr. Bohn: That we hadn't prepared [310] statements.

The Court: Hadn't prepared the statements, yes. So far as the statements go, they were admitted, but it was my impression that they had been prepared by Mr. Diza.

Mr. Bohn: I just don't know.

Q. (By Mr. Phelan): You were furnished with the prepared statement ending with the 31st day of December, 1952, when you came here? They were there? A. They were there, yes.

Q. From then on you prepared them all?

A. Yes.

Q. Now, the entries in these statements are backed up by vouchers and by books? A. Yes.

Q. The books were not posted for the first part of 1953? A. No.

(Testimony of Norman Thompson.)

Mr. Phelan: I have no other questions at this time.

Cross-Examination

By Mr. Bohn:

Q. Now, Mr. Thompson, you came out to Guam in April, the 22nd, is that correct, of 1953?

A. That is correct.

Q. Had you ever been in Guam before?

A. Never before.

Q. Had you any familiarity with business conditions in Guam? [311] A. Some, yes.

Q. How did you obtain that familiarity?

A. From my father, also from speaking to friends in Japan. At the time I took the job they mentioned the fact——

Q. What did you come out to Guam to do?

A. Manage the Dairy Queen store.

Q. Isn't it a fact that you came to Guam to help out in both Pacific Enterprises and Dairy Queen?

A. No; I took the job solely on the basis of runing the Dairy Queen of Guam.

Q. Isn't it a fact you told Henry Diza that you were here to help him not only with the work of Dairy Queen but with Pacific Enterprises and to help out in the general operation?

A. No; I didn't tell him that.

Q. You never told anybody that?

A. No; I didn't.

Q. How long did you work up at Pacific Enterprises with Henry Diza?

(Testimony of Norman Thompson.)

A. I think it must have been from one week to two weeks, I think.

Q. Could it have been as long as one month you worked up there?

A. I would have to find out. The only way I could check on that as to accuracy is through my letters home. I told when I quit working there and the other check is the warehouse—when [312] I quit working.

Q. Could that be as long as 30 days after you came to the island?

A. Right now I don't think it could be but time flies out here.

Q. What did you use as headquarters after you left Pacific Bakery?

A. Jim Butler's bachelor quarters. It is behind the Coca-Cola plant. There was a desk in there. When my car arrived I had an adding machine and typewriter in it and I set them up there.

Q. How long were you there?

A. I lived up there until November, '53, fall of '53 or winter, but before that I had moved the desk down to the Dairy Queen of Guam.

Q. And the space you used in the Dairy Queen of Guam is the extension you have been talking about? A. Part of it, yes.

Q. Where you put the desk. When did you start living down there in this extension?

A. I think it was around November or December. I think I moved in before Christmas.

Q. Of 1953? A. What is this, '55 now?

(Testimony of Norman Thompson.)

Q. Yes. [313]

A. I think I have lived down there a year.

Q. Well, if you moved there in '53 it would be in excess of a year?

A. Yes; I think I was down there for Christmas of '53, I think.

Q. Prior to that time you had been using this space as an office?

A. Oh, I still continue to use that. Oh, I remember—I started closing in the outer space on Labor Day. Is that in September? It shouldn't have taken me over a month down there.

Q. So you started living there in November and are still living there? A. Yes.

Q. And still using it as an office? A. Yes.

Q. How frequently is that store inspected by the Government of Guam or any other inspecting agency?

A. Up to about a month ago, a month and a half, it was inspected every month at approximately 1:30, but lately every other week but now they are back to every week again. For awhile they got snowed under around the Christmas holidays.

Q. So roughly you are inspected every week?

A. Yes.

Q. They inspected before you arrived?

A. I imagine they did. [314]

Q. And those inspections—you observed them? They took the bacteria count?

A. They took the ice cream from the store.

Q. They generally checked for cleanliness in the

(Testimony of Norman Thompson.)

store? A. Yes; they do.

Q. And as far as you know they made exactly the same checks before you got here? A. Yes.

Q. Do you think the Air Force or anybody else would have allowed this business to continue with five months' accumulation of filth on the floor?

Mr. Phelan: I think that is a conclusion.

Q. (By Mr. Bohn): In your experience would the Air Force allow you to have five months' accumulation of dirt on the floor? A. It didn't.

Q. Now you said that you first started in this business in 1948. When did you enter the Army?

A. April, 1951.

Q. And you were in the Army until when?

A. I got out, I think, April 12, '53. No, that couldn't be possible. Let's see—I have the record here, I think. I honestly don't know. I was in in September, I know that.

The Court: How long did you serve?

A. I served 23 months, I think, your Honor. I got out a month early. [315]

The Court: Well, did you get out approximately in April of 1951?

A. No; I was out, I think I got out the 12th of April, 1953—just before I came over here, your Honor.

The Court: Well, that is close enough. You went in in April, 1951, and got out in April, '53?

Q. (By Mr. Bohn): This was the first job you had after you got out of the Army? A. Yes.

(Testimony of Norman Thompson.)

Q. When did your father first promise you this job out here?

A. He didn't promise. He offered it to me shortly after I came back. In January I think he asked me if I would like to come to Guam.

Q. Of what year? A. '53.

Q. He never discussed it with you before?

A. He discussed it with me in '50, I think. Then the war broke out and he quit then.

Q. Wasn't it the plan for years that you would come over here and come to Guam?

A. There were a lot of plans for me—one to go to Minnesota. My brother took that out.

Q. What is your brother's name?

A. Skip Thompson—Edward Thompson, Jr.

Q. Guam was mentioned?

A. Yes, it was mentioned.

Q. When you got out of the Army your father offered you the job and you accepted it?

A. Before I got out of the Army I was in Japan and he offered it to me then.

Q. Now I want to show you the financial report for the month of April, or perhaps you can find it for the month of April, 1953, and can you tell what the gross sales and what the profit was in that month?

A. April of '53—April 30, '53, $30,823.04.

Q. Could you quickly give us the profit? My figures show the sales for that month.

A. It shows the sales here.

Q. And the profit?

(Testimony of Norman Thompson.)

The Court: The profit doesn't show on that. Let's just take it from the report.

A. Sales for April were $81,361.03.

Q. Now that is about when you said you found everything operating so badly, is that right?

A. Yes; that is the month I arrived.

Q. And things were operating badly, in your judgment? At least dirty and messed up?

A. Oh, yes; definitely. The month I took over I went over it. A month after that I almost made the highest sales [317] on Guam, which was over $10,000. May I made $9,000—August, I made $8,300.

Q. All right, that is enough. You have answered my questions certainly. How much profit did you make from those sales?

A. I could figure it out.

Q. Well, for one month.

A. The month of May I had $91,806.67——

Q. What was your profits? A. $31,403.47.

Q. I mean for the month?

A. Well, simple subtraction——

The Court: Just give us an approximation.

A. About $800, I think—$700, according to the reports.

Q. (By Mr. Bohn): About $700 in profit for this month out of $9,000 gross? What was the monthly profit in April, the month you thought was so bad?

A. I am trying to find a date. Here it is. $1,487, I think, by the reports.

(Testimony of Norman Thompson.)

Q. So the business made $1,487 in April on $8,299 gross and $700 in May on a gross of over $9,000, is that substantially your testimony?

A. No; it isn't because when I arrived here Henry had not charged insurance for some time. I wrote Dad and asked him about it and he said put it in that month, I think. I have not [318] checked this thoroughly. That is about right and, of course, in April I drew a salary also which had not been included before.

Q. But you made substantially less profit in May, is that not correct?

A. By these reports, yes, but whether this is the actual profit, I couldn't tell you.

Q. Now, you mentioned something about a new bookkeeping system that you installed. Where is your general ledger?

A. I believe it is over on the gentleman's desk over there.

Mr. Bohn: May I have that bound volume; that one right there?

Q. (By Mr. Bohn): Now, is this now your ledger? A. It is.

Q. Is that exactly the same book, cover, rather, that was handed to you by Mr. Diza?

A. I couldn't swear to that, but I imagine it was.

Q. Did you buy one yourself? A. Yes.

Q. You did? A. Yes.

Q. Where is that? A. In the safe.

Q. What records do you keep in that?

(Testimony of Norman Thompson.)

A. It is in the safe. It has journal vouchers in it but—— [319]

Q. As a matter of fact, isn't that the one he gave you, Mr. Thompson? A. I think it is.

Q. You are now using that as a general ledger?

A. Yes.

Q. Isn't it a fact that when he handed it over to you it was also used as a general ledger?

A. Yes.

Q. Was it posted?

A. Yes; it was posted up through December of 1952.

Q. Where are those postings? Where are the postings that Henry Diza made in that book?

A. No, sir; when I restarted the books, I took them out. I put them around the office, put them in boxes or around and they kicked around there and I think I eventually lost them.

Q. Let's talk about these reports. Do you have any bookkeeping training, Mr. Thompson?

A. Yes.

Q. How much?

A. I went through Edison Technical School, a year and a half of bookkeeping and trained under Dad for two years, who is a C.P.A.

Q. Now, you have kept the records in good shape since you have taken over?

A. I think so. [320]

Q. Please point out to me the records for June, 1953.

A. They are not in this book. At that time Dad

(Testimony of Norman Thompson.)

was over here and he was doing the bookkeeping at this time. Consequently he found the records in such bad shape he said, "There is no sense doing June if we have to rewrite the books," so he took them with him and made a few small entries in July and set up the new books.

Q. At that time you personally had been making entries for two or three months?

A. Yes; I can only follow—I am not a C.P.A.—from the point the other man left off. Henry or the person who set up these books made such large errors in the beginning.

Q. Point them out to me here.

A. Organization expense, which is $5,000, should not have been set up as organization expense.

Q. Will you find that entry for me, please?

A. He has it down as $10,000.

Q. What month is that?

A. June 22 to November 30, 1952, so this would be the November 30 statement, 1952.

Q. Those were all sent to your father, weren't they?

A. I really don't know. You might ask him. I was in Japan.

Q. While you were running the business, didn't your father receive these and correct them and send them back as he received [321] them?

A. He wrote me when he offered me the job that the reports were not coming through so I don't know which ones he received.

Q. Was it his habit to correct these after he

(Testimony of Norman Thompson.)

received these reports? A. From me?

Q. Yes.

A. He never sent a report back to me. They were correct when I sent them to him.

Q. I call your attention to the report for July, 1953. First, let's take a look at the month of August, 1953. There are a lot of corrections on that report. Will you tell me who made them?

A. I did.

Q. You did? A. Yes, sir.

Q. Was it the result of any instructions from your father?

A. I don't think so. Sometimes on a profit and loss statement I finish that completely and then I will go back and the thing won't balance when I make the final financial report.

Q. So you didn't receive any instructions from your father on that?

A. I haven't that good a memory.

Q. Do you have any files on it?

A. No; I do not. [322]

Q. Do you maintain an office correspondence file of your correspondence with the home office?

A. Yes.

Q. You didn't bring it with you today?

A. Oh, no.

Q. Would that indicate whether your father gave you any instructions on that?

A. No, sir; some of them were personal letters.

Q. Where are they?

A. I don't keep personal letters. It might be he

(Testimony of Norman Thompson.)

corrected me; I don't know. If I had the time I could find where the error was.

Q. Let's take the month of July, 1953. You will find on that report a notation that reads as follows: "Surplus using your figures." What does that mean?

A. I can't even find the report.

Q. What does that mean?

A. Dad was beginning to set up the books and he was beginning to change his books so he wouldn't spend so much time on Guam to correct me, so in order to make my books balance with his, he sent me the figure for surplus he put in and arrived at.

Q. So that particular month he corrected you?

A. Yes, and it probably happened several other months during the time I was working on the books Henry Diza worked on. [323]

Q. What do you carry your franchise value as in those books at the present time?

A. $15,057.61.

Q. $15,000. And where does that figure come from?

A. It derives, I believe, less depreciation, from what the franchise cost the corporation.

Q. From whom did the corporation buy that franchise?

A. I think I heard Dad say he sold it to them.

Q. In other words, the corporation bought the franchise from your father?

A. I don't know. You could ask him.

Q. And when was that figure changed? Has that

(Testimony of Norman Thompson.)

figure always been carried on the books at the same price?

A. May I see those—I could tell you.

The Court: What franchise is this, Mr. Bohn?

Mr. Bohn: Franchise for the use of the equipment.

A. I don't even see it. I don't seem to see it, to tell you the truth.

Q. Well, when did the franchise appear in the books, the value of the franchise at any figure and where did it come from?

A. I seem to find it first in July.

Q. In other words, the first time you find any valuation placed on the franchise is in July, '53, is that right?

A. That's probably it, but it doesn't check with that.

Q. Do you have any entries in that ledger for July? [324]

A. I have not but I was trying to check to see if the last one—I started in August bringing the balance forward from July, you see.

Q. You found no entries for July at all?

A. Just the amount carried forward.

Q. Now, do you find any amounts in your general ledger for June?

A. Those were Henry Diza's.

Q. Who kept the ledger in June, '53?

A. That was the time Dad was changing the books over.

Q. Who made the entries?

(Testimony of Norman Thompson.)

A. There is no entries in this.

Q. Who made the ledger entries whenever they were made in June, '53?

A. I did not. My father was out here working on the books at that time.

Q. He already testified he didn't make them. There are no entries for June as far as you know?

A. That is right.

Q. Let's check the cash books. What was the last entry you made after May 30 in this book?

A. August.

Q. August. So there are no entries in the cash book between May 30 and August?

A. That is correct. [325]

Q. Where are those entries?

A. I type them on a different sheet of paper after I file them in here.

Q. Where are they?

A. In the office, I believe.

Q. Do you have reports for the months of June and July? I mean the entries. A. Cash.

Q. You just have cash register receipts?

A. That is all these are.

Q. But they are entered from that record in the book? A. Yes.

Q. But you didn't make up such entries for June? A. Not unless I did it somewhere else.

Q. Did you make such entries on a personal record for July?

A. The same applies to that month as for June.

Q. You just didn't do it—didn't make it?

(Testimony of Norman Thompson.)

A. I won't say that—it slips my mind if I did, though.

Q. If you did where would they be?

A. They might be at the office. If this is the permanent book, this is the only place to make them.

Q. So they weren't made?

A. It slips my mind.

Q. And you have got entries in for every month from August [326] to when?

A. What did I say? January of this year; I think I said January this year—through January of this year.

Q. That is from August of '53 to January of '55? A. That is correct.

Q. You have none for June or July?

A. No, sir.

Q. And you can't explain why?

A. Yes, I can explain again—these books were being worked on by Dad, changing over and I did not have that book in my possession for that month.

Q. Or for two months?

A. See, he already made the entries for July here.

Q. Do you have cash receipts and cash disbursements in July?

A. Not cash received, no, I do not, but I see entries here not in my handwriting.

Q. Now he was changing over to another bookkeeping system. Will you find for me in the other book the entries for June and July, 1953?

A. They aren't there.

Q. To the best of your knowledge they weren't

(Testimony of Norman Thompson.)

made, is that correct? A. It might be.

Mr. Bohn: I have no further questions. [327]

Redirect Examination

By Mr. Phelan:

Q. Mr. Thompson, was any record kept of cash coming in during the months of June and July?

A. Oh, certainly.

Q. Did you deposit cash in the bank?

A. Certainly.

Q. Did you pay bills during that period?

A. Yes, I wrote checks.

Q. Did you keep a record of obligations you incurred? A. Oh, certainly.

Q. Do you have the supporting vouchers?

A. Yes.

Q. All of them? A. I think so, yes.

Q. That was the period when you were changing from one system of books to another and changing your fiscal year on a reporting basis?

A. Yes, August was our fiscal year.

Q. But you were keeping records of what you did? A. Oh, certainly.

Q. Not in these books?

The Court: Where are the records?

A. In the office.

The Court: They weren't subpoenaed? [328]

Mr. Bohn: At my request, in order to avoid issuing a subpoena, Mr. Phelan said he would bring the books.

(Testimony of Norman Thompson.)

Mr. Phelan: I didn't know the supporting vouchers weren't there. I would be glad to bring the supporting vouchers.

The Court: I don't see anything so mysterious about the missing cash records since the business indicates it didn't vary more than a $1,000 or so a month.

Mr. Bohn: If your Honor please, my point in asking the questions was that I don't know what transpired during those two months and they may well be able to account for them, but to me it well behooves individuals who criticize others for accurate record keeping to have every set of books of record brought before this court and discussed. We have two full months when not a single substantial entry has been made and further a whole series of written reports for two years and two full months for which they are not made. It may very well be they can explain it, but it is not explained yet.

Mr. Phelan: Now counsel has testified. May we bring those vouchers in tomorrow morning, your Honor?

The Court: I don't know that it is important, actually. I think I have a pretty good picture of what transpired. I think you should put them in the record, certainly. The defendant was so highly insistent upon having every scrap of information that could be made available when the management was in Siciliano, and certainly in turn Siciliano has a right to every [329] scrap of information you have available.

(Testimony of Norman Thompson.)

Mr. Phelan: I am not the bookkeeper.

The Court: The testimony of this witness is he has vouchers showing the transactions of this business during June and July and we will expect them tomorrow morning.

Mr. Phelan: They may not be posted but——

The Court: Well, whatever records there are.

Q. (By Mr. Phelan): Now, Mr. Thompson, you were asked on these reports about differences in profit for two months—I believe July and August of 1953—am I correct in that? A. Yes.

Q. I would like to also ask a couple of questions.

The Court: He was asked as to the discrepancy between $700 profit in approximately August as against $1,400 profit in May, I believe.

Mr. Phelan: I think the months were April and May, your Honor—the two months.

The Court: Well, it seems to me he explained that by saying that in the first place there was the $500 salary and in the second place he thought there were cumulative insurance bills.

Q. (By Mr. Phelan): Now at this time in the month of April, 1953, the net profit that was reported on the profit and loss statement was the net profit covering what period? Can you tell me that?

A. On this report you are showing me? [330]

Q. Um huh. Is that a cumulative net profit?

A. Yes.

Q. If so, from what date, please?

A. June 22, 1952, to April 30, 1953.

(Testimony of Norman Thompson.)

Q. Now, Mr. Thompson, what is the cumulative net profit on the next month?

A. The next month was——?

Q. May. A. May 31, 1953, $31,403.47.

Q. A difference, roughly, of 7 or $800. Now have you got a cumulative total of expenses?

A. Yes, in April expenses were $19,156.31. In May they were $23,366.66.

The Court: How much?

A. $19,156.31 in April and——

The Court: Pardon me—you mean thousand or do you mean hundred?

Mr. Phelan: They were cumulative from the start.

A. From June 22, 1952, to April 30, 1953, they were $19,156.31 and in May, 1953, covering the same period, they were $23,366.66, according to these reports.

Q. (By Mr. Phelan): Can you explain that substantial increase?

A. Depreciation on the building went up $700. Depreciation on heavy equipment went up $500. Car rental was $100. I am [331] speaking of May over April. Wages and salaries that month were $1,500 more. I believe that is due to travel out here. My plane ticket was placed in wages.

The Court: Well, now these speak for themselves.

Mr. Phelan: I am just trying to get that point in the record because apparently Mr. Bohn stressed so greatly the two months were about equal.

(Testimony of Norman Thompson.)

The Court: You are all dealing with a false conception because the plaintiff talks about profits. On the other hand the plaintiff has an action in here for the purpose of reducing that alleged profit by at least 50 per cent, so we are not talking about profit. I mean we have so many factors here that go to confuse the eventual issue. I don't know yet where this $4,000 came from to put up an extension. I don't know whether any money was paid for that extension. Do you know?

A. No, when I came it was up. It wasn't in our books.

Mr. Bohn: It is not paid; it is part of the other action.

The Court: Then if it is charged against the business it comes out of profit.

Mr. Bohn: We take the position it is an increase of capitalization, not an operational expense at all.

The Court: It has to be paid for. How, if not against profit?

Mr. Bohn: On the other hand it is offset——

The Court: That may be correct, but you are asking for [332] $4,000 out of what they have and give it to you. I don't care where they get it. They have $4,000 left——

Mr. Bohn: But they have an offsetting value.

The Court: Well, you can't spend an offsetting value. It comes from profit and loss.

Mr. Bohn: Well, it comes out after depreciation.

The Court: They may increase their book value $4,000.

(Testimony of Norman Thompson.)

Mr. Bohn: And then pick it up on income tax depreciation schedules, deducting a percentage.

The Court: But the fact remains, Mr. Bohn, they have not added it to their capital account and you say they owe you $4,000. Now if they owe you $4,000 it has to come out of profit; it can't come out of anything else.

Mr. Bohn: Well, the cash would come from cash on hand whether it be called profit, surplus or whatever it may be.

The Court: Well, cash on hand, yes. We are talking now about the gross and net profit and if you have a charge and you have figured out everything else and the charge has to be paid, what can you do except reduce your gross or net profit?

Mr. Bohn: Well, not in our view of things and I am not an acountant, certainly, but in a business which is in a high income tax bracket cash, many times, ends up, as a rule, after depreciation is scheduled. In this particular case he has not set it up on a depreciation schedule. In fact he has ignored the increased asset, if we can call it [333] that.

The Court: I may be mistaken, Mr. Bohn. I was under the impression that was built while you had the books.

Mr. Bohn: That is correct.

The Court: They didn't do anything; they didn't set it up on the books.

Mr. Bohn: That is correct.

The Court: So I don't think you should hold the

(Testimony of Norman Thompson.)

defendant responsible for your failure to set it up on the books. That is what you contended.

Mr. Bohn: I didn't contend——

The Court: You are arguing that the books were not properly set up. The responsibility is not theirs but yours. It is equally obvious if they got value—a simple matter that wasn't reflected on the books and they get the benefit for it without paying —but that is a matter you will have to go into. All I know now is the extension was built and the contention is made that nobody agreed to have it built. It has never been used for the purpose for which it was built. Other than that I know nothing.

Mr. Phelan: As a matter of fact, the purpose has been rather obscure, too.

The Court: I have no information on it. I presume we have to rely on the plaintiff.

Mr. Phelan: I have no further questions at this time.

The Court: Now, Mr. Phelan, how many more witnesses will [334] you have?

Mr. Phelan: Possibly recall Mr. Edward Thompson; that is all.

The Court: Are you going to press your counterclaim?

Mr. Phelan: Probably not.

The Court: Well, I am trying to assist you in arranging your time here because tomorrow morning is my Judicial Council morning and I set aside tomorrow afternoon——

Mr. Phelan: I think I can probably be through in 30 to 40 minutes at the most and possibly less.

(Testimony of Norman Thompson.)

The Court: Now are both of you through with this witness?

Mr. Phelan: Until he brings back the other papers—until we get some more books.

The Court: Well, now, suppose we do this—suppose we meet at 9 o'clock tomorrow morning and that will give us an hour and a half in the morning, or roughly an hour and 20 minutes before Judicial Council, and then we will have tomorrow afternoon; if we don't conclude by tomorrow afternoon then we have a problem. I will check my book but it's my recollection that we have something else set up on Thursday. I will see. You understand, Norman, we want you when you come to court tomorrow to have all of the entries that you made even if you just made them on a scrap of paper. We want them here to tie up this June and July hiatus in 1953 and find out what happened during those months, is that clear? [335]

A. Yes, your Honor.

The Court: I think we will recess until tomorrow morning.

(The court recessed at 4:55 p.m., February 15, 1955.) [336]

Wednesday, February 16, 1955, 9:00 A.M.

Mr. Phelan: Mr. Thompson.

The Court: You want to finish up with Norman?

Mr. Phelan: Well, the elder Mr. Thompson brought the records up.

Mr. Bohn: Is Mr. Norman Thompson going to come back?

Mr. Edward Thompson: He didn't understand you wanted him.

Mr. Phelan: Let the record show that Mr. Edward Thompson is taking the stand.

MR. EDWARD THOMPSON

previously called as an adverse witness by the plaintiff and previously called as a witness by the defendant, having been previously sworn, testified as follows:

Reredirect Examination

By Mr. Phelan:

Q. Mr. Thompson, have you got the records of the business for the months of June and July?

A. Yes, last night I asked Norman to get the cash figures for June and July of 1953. I don't think it was made clear but in May of 1953 when we sent Joe Siciliano the termination notice, upon advice of their attorneys in Seattle, the corporation had to rewrite the books as a corporation instead of a partnership if the corporation held that the partnership had never existed, so I asked Norman to send me the books to Seattle and just rewrote them in corporate form, closing them out at the close of

(Testimony of Edward Thompson.)

the corporate year. It took me a month or two months to do that. [338]

The Court: That isn't the only change. You set up a new set of books as of July 31.

A. I am coming to that, your Honor. Those books I set up in Seattle because it is a Seattle corporation. Then I set up a new set of books which I forwarded to Norman. I never thought at the time that I would be required to explain that. If necessary, we could bring the books from Seattle. Norman had a record here of all monies that came in and all monies expended. These were in the office here and you can look at them.

The Court: Now you are interested in June and July?

Q. (By Mr. Phelan): Mr. Thompson, those are the records of cash received and expended during those months?

A. Cash receipts by day for the two months under review and all the money expenditures either by check or by cash.

The Court: Well, I think that is substantially what you want.

Mr. Phelan: Yes, I want the opportunity to examine them and to cross-examine him on them.

The Court: Aren't those to be introduced, Mr. Phelan, possibly as an addendum to the reports so you will have the entire cash story?

Mr. Phelan: I think we ought to put them in the same place, Cris. What is the number of the exhibit that is those reports on the bottom?

(Testimony of Edward Thompson.)

The Clerk: Exhibit I. [339]

The Court: Yes.

Mr. Phelan: May I have them, Mr. Thompson? Will you please mark them, Cris.

The Clerk: This will be Exhibit I, your Honor.

The Court: Yes, just mark them all Exhibit I and then just attach them to the exhibit.

Mr. Phelan: I don't know whether they are punched or not. If not, we can punch them afterward. May I glance at them for a second, then I want to ask Mr. Thompson a couple of questions.

Q. (By Mr. Phelan): Mr. Thompson, would you give us the total sales for the month of June and for the month of July?

A. Total sales for June according to the cash register were $9,511.64. We actually picked up in cash $9,517.05, a little over $5.00 more than the cash register shows. The cash register shows $2,618.54 for July.

Q. Is that for the whole month?

A. I beg your pardon. That is for one week. The sales for July according to the register were $9,993.01. The actual cash was $10,002.95. We used the cash for our figure, naturally.

Q. Does that slight overage indicate a mistake in the register?

A. Yes, sometimes a man might drop an extra dime or so in without ringing it up or the drawer may be open.

Q. For the month of June what were the expenses?

(Testimony of Edward Thompson.)

A. These are the cash records. The expenses, of course, [340] we had rent, insurance and things like that and this is simply the cash record and those were regular monthly charges. This is money that was actually paid out.

Q. Do items like depreciation vary from month to month? A. No, sir.

Q. So those items would be the same?

A. They are the same every month. We pay the rent in advance. We pay insurance a year in advance. They are fixed charges every month. We can compute the profit easily.

Q. How long would it take you to do that, Mr. Thompson?

A. Oh, less than a day. I can't reach up in the air and do it.

Q. Is it possible to compute the gross and net profit from those figures and fixed charges?

A. From the fixed charges, surely.

Mr. Phelan: I have no other questions.

Mr. Bohn: May I see those?

A. You bet.

Recross-Examination

By Mr. Bohn:

Q. Now you have here a report of sales for June and a report of sales for July. You have cash expenditures for those two months?

A. That is right, sir.

Q. And that is all these reports show, is that correct? [341]

(Testimony of Edward Thompson.)

A. That is all I thought was asked.

Q. Well, are there any records showing how much profit was made in June?

A. The books in Seattle show it or we can construct it right from the fixed charges.

Q. Can you construct the profit from the figures for the month of June?

A. I think we could, yes.

Mr. Bohn: I do not wish to impose upon the court, but I have been trying to get these profit figures. I would like to have them prepared.

Q. (By Mr. Bohn): Is it something you can do in a few moments?

A. Oh, no, it would take more than a few moments.

The Court: The fixed charges appear in the reports. I think we can come close enough.

Q. (By Mr. Bohn): Can you give us an estimate of what the profit would be in June?

A. I couldn't do it very readily, no.

Q. In other words, these reports do not show the June profit or the July profit, is that correct?

A. No, sir.

Q. Neither you nor Norman Thompson made up a standard report for June and July, is that correct?

A. I don't know whether it was done or [342] not.

Q. Have you ever seen them?

A. I don't know whether I have seen them or not.

(Testimony of Edward Thompson.)

We do not have them in the office if that is what you mean.

Q. Then for a period of two months you did not make up those reports, to the best of your recollection?

A. For those two months I did the bookkeeping in Seattle. I may have made up the reports, but I didn't think it necessary to send them out here to Norman.

Q. You think you made them up?

A. I think so. It would be ordinary procedure for me to do so—post the trial balance and make out the reports.

Q. I think you testified that December, '54, hasn't been made up yet?

A. No, it hasn't been made up yet.

Q. And January, '55? A. No, sir, not yet.

Q. About the same length of time that the reports had not been made up by Henry when your son arrived in Guam, is that right?

A. No, my son arrived in April, '53, and he hadn't made up the January reports yet. He hadn't done January, February, March and April. The books were written up in December and a trial balance was taken and the reports were put in order, but I have been keeping Norman busy on other matters.

Q. In other words, it is a matter or routine that you can [343] put off?

A. No, I knew the trial was coming and he spent a good deal of time digging out records.

(Testimony of Edward Thompson.)

Q. What records did he dig up?

A. He searched for the original books of entry Henry made and things like that.

Q. Where did you keep these records?

A. In the office.

Q. In a filing cabinet? A. On a shelf.

Q. In boxes and things like that?

A. Just on a shelf.

Q. Roughly similar to the way your son testified he found them in Pacific Enterprises when he came out?

A. No, he kept them on a shelf. I don't know how he testified he found them. I wasn't paying attention.

Q. He testified he found them on top of filing cabinets and so forth.

A. We keep the books, the journal and ledger, on the shelf, other things in a filing cabinet.

Q. How long did it take your son to dig up these things?

A. Not too long, about a day, but we spent time discussing them.

Q. Anyway he slipped behind in his reports?

A. Yes. [344]

Q. Because he was busy?

A. No, I took too much of his time, I guess.

Q. Now, Mr. Thompson, when you reconstructed or rearranged these books in the months of June and July, isn't it a fact that what you accomplished was this: That you rewrote the books to reflect the

(Testimony of Edward Thompson.)

situation as if the corporation had been owning and managing this business from the beginning?

A. That is correct, sir, and set them up on the corporation's fiscal year.

Q. In other words, nowhere in these accumulated profit items, such as your surplus in July and your surplus and profit in August, '54, your surplus in July of '53 and whatever your profit was as of August 31, '52—nowhere do these reports now reflect the capitalization of the partnership?

A. No, they are constructed to reflect the business of a corporation.

Q. So we simply cannot find out from these profit and surplus figures what the profit really was if there had been a partnership operating all this time?

A. Oh, surely. The net worth would be the same only if you keep books for a partnership you divide the net worth among the partners but in a corporation you show it as surplus or undivided profits. That is the only difference.

Q. But isn't it also true that the capitalization of the corporation as reflected in these figures is substantially [345] different than the capitalization of the partnership?

A. In this respect—a partnership would not pay taxes; the individuals would pay the taxes.

Q. I am talking now about capitalization.

A. A partnership does not have a capitalization. A partnership has a net worth. The books would

(Testimony of Edward Thompson.)

show the capital of a corporation which would not be shown on partnership books.

Q. And the depreciation schedule is different than it would have been if you had prepared these books as a partnership, isn't that right?

A. No, sir, we use the same figures.

Q. What capitalization did you start with in your present bookkeeping system as of June 22, '52?

A. Whatever amount had been expended at that time. I don't know the exact figure.

Q. The amount that the corporation had expended and not the agreed partnership capital?

A. That is right.

Q. So there is a difference?

A. There is a difference in the capitalization. I have said that, yes.

Q. So therefore we cannot tell from the surplus figures you use and the profit figures you use at the end of the year—we cannot tell what those figures might be if you had maintained these figures as partnership books, isn't that right? [346]

A. Maybe you can't tell but we can tell. Add one half of Joe's capital plus the surplus which hadn't been distributed and that would be the net worth.

Q. I am not talking about net worth; I am talking about profit.

A. The profit is shown by the books and if it were a partnership, the profit would be divided between the various partners.

Q. The amounts would not be identical?

(Testimony of Edward Thompson.)

A. There would be a difference, of course, on account of income taxes.

Q. Also on account of capitalization?

A. I can't see how that would make any difference.

Q. Depending upon the capital investment and fixed assets. What, for example, are you carrying the value of the franchise at now?

A. From the beginning when we opened the books we put it on the books as $18,750.

Q. On whose books?

A. On the partnership books. Henry had them.

Q. So you started with the value of the franchise at $18,750? A. Which we depreciated.

Q. And what are you carrying it as in the corporation books? [347] A. Same thing.

Q. In other words, the corporation shows the value of the franchise as $18,750?

A. That is right, less $50, less depreciation.

Q. Was the franchise purchased from you?

A. From me and George Henrye.

Q. In other words, the franchises were obtained either by issuing stock to you or cash to you?

A. That is right.

Q. Now you say that the partnership books also had $18,750 for franchise, is that correct?

A. Yes, we did, yes.

Q. I think you told me that the agreed partnership assets were a total of $38,000. What made up the difference of $28,000?

A. Well, $38,000? Then I must be wrong about

(Testimony of Edward Thompson.)

that $38,000 carried on there because right offhand I can think of more things than that because we had $15,000 in buildings alone and $15,000 in inventory. You are right. It is probable it wasn't carried on the books at all.

Q. Now is that your best judgment that the franchise wasn't carried on the books at all in the partnership?

A. I am surprised it wasn't, but that must be the case, yes.

Q. And when you reconstructed these books as if the corporation had operated it from the beginning you set up the [348] franchise at a certain value? A. That is right.

Q. Now there are other expenditures on the corporate books which were not reflected in the agreed partnership capital, isn't that so? A. Yes.

Q. So when you made your adjustments you reflected those? A. Undoubtedly, yes.

Q. All I am trying to get at—well, withdraw that question.

Mr. Bohn: I have several other questions to ask this witness, your Honor, but they are really not proper cross-examination. I can ask them at this time or when the defendant closes his case I can recall him as an adverse witness. I don't know how the defendant would want to handle it.

The Court: I think you had better ask questions now while the witness is on the stand.

Mr. Phelan: I would like to know what kind of questions they are.

(Testimony of Edward Thompson.)

The Court: Well, then we can determine whether they are questions that should have been asked when he was originally called or matters brought out by subsequent testimony.

Q. (By Mr. Bohn): Were you present when your son, Norman, was testifying yesterday?

A. I was present but I was sitting in back and I didn't [349] hear very well.

Q. I asked him this question: I said "Isn't it a fact that when you first came to Guam you came to Guam to help out not only with the Dairy Queen but with Pacific Enterprises, Talk of the Town and other Siciliano enterprises?" and my recollection of his answer was no. Now I am going to ask you the same question: Isn't it a fact that when your son came to Guam he came to help out partly with the Dairy Queen and partly with the other Siciliano enterprises?

A. Well, his testimony was correct insofar as he knew. He was sent over to take over the Dairy Queen but I had written Joe that Norman would be here and the Dairy Queen probably would not take all of his time and I said he would be very glad to help Henry with Pacific Enterprises. I told Joe that he had considerable experience and that he would be glad to do it.

Q. In other words, he wasn't sent over solely to take over Dairy Queen?

A. So far as he knew he did but I did offer and said he would do anything he could to help.

Q. Now I am going to read to you from a letter

(Testimony of Edward Thompson.)

dated March 8, 1953, directed to Mr. Diza and I am going to ask you if you gave this information: "My son is a good accountant and he will see that the inventory is properly taken. He will price and figure the inventory and he will make the accounting a cinch for you. He will be instructed to work with Henry Diza [350] at all times."

A. The letter is to Diza, yes.

Q. "Henry will get a copy of every statement, inventory and other typing he does for the store. He will discuss with Henry all he is doing or promises to do. He will take over most of the bookkeeping for the Dairy Queen so that all Henry will have to do is check to see that it is right. He is a good accountant and I know he will be glad to help in the office whether it is the Talk of the Town or anything else and anything he can do to help will be good experience for him and keep him from getting bored with the island."

A. Yes, I thought the letter was to Joe. Of course conditions changed after that and in May we considered we no longer had to give any information to Henry or anybody else.

Q. That is my next question: Were reports sent to Henry or anybody representing Mr. Siciliano since May, 1953?

A. None since May, 1953.

Q. After that no reports of any kind were sent?

A. Conditions changed.

Q. You didn't send reports—that is my question.

A. My answer was no, yes, sir.

(Testimony of Edward Thompson.)

Q. Now there has been some discussion here, and I think you have heard most of it, about an addition that was built to the building on the original Dairy Queen. Have you heard some of that testimony? [351]

A. Yes, I have heard some of it.

Q. When was the first time that you heard that that building had been constructed?

A. I think on August 2 a letter was written—no, I received a letter on or about August 2, 1952. It said an addition was being put on our building and I wouldn't recognize the building and a few days later W. B. Fuller and Company wired me that Mr. Siciliano had been in to order some glass for a building and asked that the invoice and shipping documents be sent to Mr. Siciliano on Guam rather than to me and they asked if that was satisfactory with me, and I wrote them that I hadn't heard from Mr. Siciliano since early in July and asked them to hold it up until I could see or contact Mr. Siciliano. That is the first time I heard about it.

Q. You knew in August, 1952, that this building was constructed? A. That is right.

Q. Did you ever receive a letter from Mr. Turner or anyone else in which you were asked to make provision for reimbursement of those expenditures?

A. No, sir, not then but I did, yes, recently.

Q. I am talking about back in 1952?

A. No, sir.

Q. Isn't it a fact that October 10, 1952, you re-

(Testimony of Edward Thompson.)

ceived a letter from Mr. Lyle Turner in which he made the following [352] statement: "I have asked Henry for the figures on the cost of the addition to the Dairy Queen building since he advised me yesterday this has been dispersed from Pacific Enterprises' funds. It is my desire to have that disbursement reimbursed at the first opportunity in view of the pending litigation on Guam. I am writing you further on this as soon as I have the figures on hand." Did you receive such a letter from Mr. Turner? A. I don't remember.

Q. Would you say you did not receive it?

A. I won't say I didn't receive it; I don't remember.

Q. Isn't it a fact that in the fall of '52 some time you knew that a request was being made of Dairy Queen to reimburse Pacific Enterprises?

A. I do not remember now. We would have refused to pay anyhow. We didn't want the addition. We have never used it. It was not put up as an addition to the ice cream plant; it was put up as a snack bar. There is no question about it. Mr. Joe Siciliano called up long distance from Las Vegas and Joe said "You must be mistaken; you were just excited," and I denied it. He said it was all finished and in operation. He called it a snack bar and I don't know what the rest of the conversation was but a day or so later I wrote him and told him, confirming my statement over the phone, that I had never heard of it and never discussed it with him. It was a complete surprise to me. And then I said,

(Testimony of Edward Thompson.)

"However, if the snack bar is completed [353] and in operation, it is water over the dam." Then I said I presume the snack bar being on partnership property it would be for the benefit of the partnership, or words to that effect.

Q. You don't deny it was for the benefit of the partnership?

A. I don't know. It has never been used for it.

Q. Regardless, it is a fact that it was constructed and almost completed but you refused to OK the vouchers on the windows and it couldn't be put in operation?

A. No, sir, that is not true. Joe Siciliano went to W. B. Fuller and Company and, as the telegram said, told them to send the invoice to him and not to me and Fuller Company wired to ask me what I knew about it.

Q. In any event as a result of that situation the windows weren't sent at that time?

A. Yes, I told them to hold them up. We didn't want the snack bar. We didn't have any use for a snack bar.

Q. I am not trying that litigation now. Judge Shriver wanted to bring up that particular point. Now there has been some discussion throughout this trial of matters involving a claim for payment of housing and subsistence for the employees of the Dairy Queen of Guam. I am going to ask you when you first knew that such a claim was going to be made?

(Testimony of Edward Thompson.)

A. I got the claim, the statement, on or about April 11, 1954. [354]

Q. When did you first know that subsistence and housing was being furnished to these employees by Pacific Enterprises and that they were expecting reimbursement for it?

A. I don't know that. That was brought up, I knew that they were furnished subsistence and housing, but all disbursements were being made from cash and the monthly reports showed payroll and such and I didn't know whether that included subsistence and housing or not, but so far as I know no statement was ever given to me or mailed to me until April, 1954.

Q. Isn't it a fact that January 2, 1953, Mr. Lyle Turner wrote you a letter in regard to these employees and used the following language: "The cost of said laborers to Dairy Queen of Guam, $120 a month. In the case of Dairy Queen lead men your company will be generally debited for the room and board of these employees."

A. Yes, but those were being paid by cash and I don't know whether that was being paid or not.

Mr. Bohn: I have no further questions.

Mr. Phelan: I have a couple of questions.

(Testimony of Edward Thompson.)

Redirect Examination

By Mr. Phelan:

Q. Mr. Thompson, one of Mr. Bohn's first questions was pertaining to profit. Has profit got anything to do with the amount of capital invested or is profit a certain sum——

A. Oh, if the profit is left in the business it is part [355] of the capital of the business, yes.

Q. What I mean is does the amount of profit have any relation to the amount of profit you make each month?

A. No, except it helps you earn.

Q. So if the books were kept on a sole proprietorship or a corporation if you made a profit of $1,000, it would still be $1,000? A. Yes.

Q. The percentage on the amount of capital investment would vary? A. Yes.

Q. But the amount of profit would be the same?

A. If you made $1,000, you made $1,000.

Q. Now, Mr. Thompson, is it possible that this franchise was contributed?

A. I beg your pardon?

Q. Is it possible that the franchise was contributed to the partnership at its inception without being considered as more than $1.00?

A. I didn't think so but evidently it was. Evidently we omitted that.

Q. Now, Mr. Thompson, in 1952, during the year 1952 who was the attorney for American Pacific

(Testimony of Edward Thompson.)

Dairy Products on Guam? A. Lyle Turner.

Mr. Phelan: I have no further questions. [356]

Mr. Bohn: I have no further questions, your honor.

Examination by the Court

Q. I just want to know for my general information—why was this addition that was constructed, if not otherwise being used, not used for warehousing purposes?

A. It wasn't big enough for warehousing purposes.

Q. Your testimony was you had about 16 by 30 feet?

A. 16 by 30 feet, yes. It was cut up into two rooms. We require more than that for warehousing.

Q. It was cut up by a partition, wasn't it?

A. Yes.

Q. By removing the partition couldn't you have used it for warehousing?

A. I don't know. We require more than that. You see, we bring in over 40 drums of mix at a time and the drums are that big around (indicating). They weigh 300 pounds. You can't stack them one on top of the other. You can't get the boys to pick them up. If you had a hoister you could move them around, stack them two high. Then we had cases of flavorings at that time and then, of course, we use bags and spoons and other things. We have quite a large warehouse.

(Testimony of Edward Thompson.)

Q. If it had been adaptable it would have been very beneficial as it would cut down your cost.

A. It would have been very handy, too.

Q. You are paying so much a month for warehousing? [357] A. $65.00, yes, sir.

The Court: That is all.

Mr. Phelan: I have nothing further to offer.

Mr. Bohn: I beg your pardon, Mr. Phelan. I didn't hear you.

Mr. Phelan: I have nothing further.

The Court: You can start in on your rebuttal.

Mr. Bohn: We have no further witnesses, your honor.

The Court: We agreed that at this stage the defendant's cross-complaint in the case of Siciliano vs. American Pacific Dairy Products should be dismissed for failure of any proof.

Mr. Phelan: The record is confused enough now without trying to go into the elaborate accounting calculations that would be necessary to prove that cross-complaint.

The Court: Yes, so far as any cross-complaint by Pacific Enterprises or American Pacific Dairy Products vs. Siciliano that is dismissed.

Mr. Phelan: In this one case.

The Court: In this particular case. That has nothing to do with your cross-complaint against Pacific Enterprises, Inc. Now, gentlemen, I want to discuss at this time my initial thinking as regards this case. It is not the judgment of the court because I simply want you to be in a position to

discuss the problems which I raise. First, that the evidence appears to be clear that at the time this agreement was entered into [358] between the plaintiff and the defendant it was contemplated by both parties that the plaintiff would continue to be available in Guam and to provide managerial assistance in the proper operation of the store. I think that is evidenced not only by the testimony but by the partnership agreement itself, which provides that the defendant shall devote such time as may be mutually agreed upon between copartners, together with his skill and energy, to the best interests of the business and obviously he could not devote any time or energy from Las Vegas, Nevada. "The second partner agrees to devote such time as may be mutually agreed upon between copartners, together with his skill and energy, to the best interests of the business of the copartnership." Now the first party similarly undertook to devote such time and effort and so far as I can determine the first party, insofar as the operation of this business is concerned, has kept its agreement and has provided that assistance from Seattle, the purchasing and so forth which undoubtedly took up considerable time and rendered every possible assistance. It seems to me to be equally clear that Mr. Thompson was thoroughly sold on Mr. Siciliano's ability to do a job in connection with the Dairy Queen and was anxious to continue that association as evidenced by the agreements, the suggestion of extension to Okinawa. In other words, he was impressed with the fact that Mr. Siciliano knew this section of the country and

was extremely capable of exploiting the economic opportunities which might exist here. [359] I think your evidence shows again that Mr. Thompson nursed this thing along by his correspondence and by the friendly atmosphere which prevailed; a willingness to help him out in any way he could in his domestic troubles; efforts to get him to return to Guam, if possible, and all that kind of thing. We find nothing here except the friendliest attitude, but undoubtedly Mr. Siciliano was of major assistance in connection with the opening of the store. I do not assume that the store would not have been opened and operated with reasonable success if Mr. Siciliano had not been available for the simple reason that it was a new product. Mr. Siciliano had nothing to do with the building, the leasing of the land, the equipment, the obtaining of materials and all that sort of thing. Primarily the opening was simply a question of the finishing touches and exploiting a business which, because of its unique character in Guam, was bound to attract a considerable amount of patronage, so I think we can safely assume that. Again let me remind you that I am just throwing these things out for discussion. It appears to be true that Mr. Siciliano's associates, Pacific Enterprises, did a better job of management than Norman Thompson did after he took over as the ratio of profit, net profit, appears to have been greater, but that may be elusive because we have not yet determined what hidden obligations there may have been on the part of the alleged partnership to creditors which were not reflected in the

reports. Neither do those statements show [360] any charges made by Mr. Siciliano for such management or any pro rata charge for bookkeeping, supervision and so forth, so it is that we have rather an elusory assumption at the present time. The position taken by the defendant in this case is that there was a failure of consideration and that consequently the defendant was at liberty to cancel its written obligation at will. I do not accept that for a moment. I think it is perfectly clear from this testimony that while we talk about a board of directors, that Mr. Thompson is the corporation to all intents and purposes; that when it comes to the management, that the corporate directors were thoroughly familiar with this contract as early as August, 1952; that they accepted it; they approved it and they accepted Mr. Thompson's assurances that it was a very sound transaction on behalf of the corporation. So far as ratification, the contract was in existence. I don't care to hear any more on that. I think that is a closed issue. Mr. Thompson and Mr. Turner said it was a closed issue; there never had been any doubt about it. It had been approved but they thought it wise to put in certain contingencies as to his return, so we have Mr. Siciliano, through his associates, operating this business until April. Now I quite agree with the defendant that the way this business was operated was not in accordance with the contract and I quite agree with the defendant that something had to be done to regularize the operations: that in the ab-

sence of Mr. Siciliano's interest, presence, energy and so forth, the [361] copartner did not have to rely upon employees who were not even responsible to the partnership to see that its activities were continuing. There were inadequate cash controls, ridiculously inadequate, because with this type of operation, very clearly the bank account should have been the control. The money should have been paid into the bank account, drawn out of the bank account and set up on the books so that there was adequate control at all times. That was not maintained and I agree, certainly, with the defendant that it was entitled to take steps to recapture the management of this enterprise for the partnership. At that time it was not being managed by the partnership at all. It was out on the right or left somewhere. Theoretically nobody had any control. Mr. Thompson had no control over anybody except those who were actually employed and whom you were paying at the plant itself. Now that was highly irregular. Now we know that this condition continued by virtue of the fact that Mr. Siciliano's plans were uncertain and presumably he expected to return to Guam at any time and to take over his business enterprises again. We should not delude ourselves simply because it isn't in the record. There were domestic difficulties, there were suits in court and so forth and he was in a very messy situation as regards the situation in Guam. This partnership agreement provides a method for its dissolution by one partner buying out the other. Both parties abandoned that as a method of settling

any differences between them as regards the agreement. [362] Neither party has offered to purchase the interest of the other in accordance with the formula that was established. The defendant arbitrarily took over and said "You are out." The defendant had the alternative at that time of bringing an action for rescission, paying what it considered a just contribution into court. It did not do that. It continued to use the capital contribution; it continued to use the profits as it saw fit. It is my view that this partnership agreement, so-called, is not authorized in law. So far as I can determine the articles of incorporation of the defendant do not authorize it to enter into partnership agreements, but very clearly the corporation was formed solely for the purpose of operating this store in Guam and other stores. It has received the benefits of capital, effort and everything that was required to make a going concern of the business from the plaintiff and cannot be heard now to say that it had no legal authority to do so. If it is not a partnership, it is a joint enterprise. I think that it is a joint enterprise entered into between the parties. I think that that joint enterprise ceased as of the time that the corporation took over effective control of the partnership and excluded Mr. Siciliano. I think that it took over that effective control as of July 1, 1953. I think that Mr. Siciliano is entitled to a judgment which will give to him his capital, his share of the profits to July 1, 1953, and to interest at six per cent on that from July 1, 1953, until paid. I think that in order to enforce

that judgment he [363] is entitled to a receiver immediately. I think that he has a lien or half interest in the Dairy Queen and I think the corporation holds in trust for him to pay the judgment 50 per cent of the stock which it owns in the new Guam corporation. Now we are dealing with a practical situation here. This is a small enterprise. It is not large to the extent that when you add to your cost of doing business everybody loses; to the extent that you complicate the operation of that business you will benefit no one but the competitors of that business, and therefore I think that Mr. Norman Thompson should be appointed receiver for this operation and that counsel should agree upon an independent accountant to make a study of the information we have and advise the court as to what amount is due Mr. Siciliano at the present time. Now this is not my judgment nor my findings of fact. I merely throw these out because I want you to shoot at them and I want you to question them. I will first hear from the plaintiff.

Mr. Bohn: Well, your honor, first of all, I shall say that I appreciate the very clear exposition that the court has made of the issues in this case and its general suggestions as to the matters which may or may not have been proven. I cannot find myself in disagreement on too many points. There is one, however, where I must be in complete disagreement and that is that the joint venture terminated as of any date prior to the date this court declares a dissolution. It is my theory that joint ventures in judging—— [364]

The Court: Now, Mr. Bohn, the court takes into consideration in connection with that that the corporation had effective control of all of the assets, the money and everything else as of July 1, 1953; that you began no action, nor according to the evidence here, demands were not made or anything else until September of 1954.

Mr. Bohn: As to those facts I cannot disagree, as to the fact of effective control in July of 1953; I cannot disagree as to the fact that no action was brought or demands made pertinent to this matter until the date this action was commenced. I cannot disagree. It is a question of law which I am propounding, which I believe to be sound. There has been some confusion in the cases, that I concede, as to when dissolution of one of these agreements actually takes place. I believe the better view is that there can be no dissolution until ordered by a court of competent jurisdiction. Certainly actions can occur throughout the operation of a business which the court might well find would have warranted a dissolution at the time had an action been brought, and I also concede that there is confusion in terminology in the cases when they talk about dissolution by an act of the parties, but in general it is my view, and I think the latter cases bear me out, that there is only one way in which a partnership, and I believe that the same rules apply, can be dissolved and that is by order of a court. Certainly there is no doubt whatever that the court can order that today or order [365] it any day.

The Court: Mr. Bohn, I have no way at all of measuring the damage which may have occurred by virtue of the fact that Mr. Siciliano ceased to have any management of the operation of the business as of July 1, 1952. I don't think he can demand that he is entitled to 50 per cent interest at the same time clearly demonstrating that he has done nothing personally to fulfill his obligation.

Mr. Bohn: That leads me to the only other point with which I disagree with the court. It is my view that what was in these parties' minds prior to the execution of this contract becomes immaterial by virtue of the contract itself. I think it is true in any agreement that is ever reached that people have conflicting ideas.

The Court: Mr. Bohn, you presented evidence of the preliminary negotiations; you went back to the time that Mr. Siciliano was originally appointed an agent.

M. Bohn: That was done for the purpose of indicating that there was a change in tempo from what Mr. Thompson stated to this court he had in mind at the time of the execution of this contract.

The Court: Surely the court has a right to determine the matter on the theory which the parties advanced, and your theory was that you had rendered considerable service in advance of the agreement and so forth, so if you went behind the agreement—— [366]

Mr. Bohn: That evidence was also introduced for another purpose—it was to show this: I don't think there is the slightest question but what a year

and a half before this agreement was executed, Mr. Thompson was looking for a manager on Guam. He wanted Mr. Siciliano and couldn't get him. He wanted Mr. Siciliano in a 20 per cent corporate business and he couldn't get him.

The Court: Which he freely admits.

Mr. Bohn: So then he finally came and said, "I will sell you 50 per cent."

The Court: Exactly, "I want you that much."

Mr. Bohn: But "I also want your $15,000."

The Court: We have no evidence here to that effect.

Mr. Bohn: We have a payment of $15,000, your honor.

The Court: I would think just the contrary because, as you say, they originally tried to keep his contribution lower, to 20 per cent, and he said "I am not interested unless I have 50 per cent," and it was he who insisted on the 50 per cent, not the corporation.

Mr. Bohn: Then my point is, your honor, that he bought and paid for it.

The Court: That is correct.

Mr. Bohn: And having bought and paid for this interest and from all that appears from the agreement of the parties, and I am sure it was true, as of this moment they are on an equal basis. [367]

The Court: If that is what he wanted he had a perfect right to put in his contribution and be paid a profit, but he didn't do that. He agreed to devote his time and energy.

Mr. Bohn: On that point I find myself in slight disagreement with the court.

The Court: What does the partnership agreement mean?

Mr. Bohn: I take it there are two agreements.

The Court: We are not talking about the management of the business. If nothing more, we are talking about "The second partner agrees to devote such time as may be mutually agreed upon between copartners, together with his skill and energy, to the best interests of the business of the copartnership."

Mr. Bohn: Now I take the position that that has to be read in its entirety and that the last sentence does not modify the first. In other words, I would read that to mean that the first partner or second partner——

The Court: Mr. Bohn, you don't question that it was mutually agreed that Mr. Siciliano would be the manager?

Mr. Bohn: Now let's see whether I question that or not. I take that that it is mutually agreed at this time. In other words we have no evidence before this court that there was any supplementary agreement to this, that he would personally manage the business, as a matter of fact, while we do have evidence before the court that as of this time Mr. Siciliano was operating four or five very large businesses; that while the $300 a day [368] this business took in was substantial, it was a drop in the bucket compared to the $2,000 or thereabouts

a day which was coming in from his other businesses.

The Court: Exactly.

Mr. Bohn: Now to treat Mr. Siciliano, the owner of a large corporation and large enterprises, in the same category as an individual who was given a 50 per cent interest for an investment and who personally agrees to manage a business is, I believe, not to give full consideration to the situation which was required. In other words, the name Siciliano has been used and Mr. Thompson very graciously testified as to his high opinion of Mr. Siciliano, but it seems abundantly clear to me from the evidence that what was needed for this business and what it got was service, equipment, know-how, transportation operations.

The Court: And failure to repair a cash register for months.

Mr. Bohn: Well, I have no detailed information on the cash register, but to me it is abundantly clear that in June of 1952 how did you transport things from the dock to the Dairy Queen?

The Court: Exactly.

Mr. Bohn: Where did you find air-conditioned warehouses in June of '52 on the island? Where does one find employees in June of '52, competent to run this business? In other words, I am not in substantial disagreement with this court. [369]

The Court: He found them through Mr. Siciliano. Your initial assumption is that after having paid his initial contribution he could wash his

hands entirely; the second that he was acting purely gratuitously?

Mr. Bohn: The second agreement spells out the exact interest of the parties in physical assets and in the operation of the business. In other words, I think you have two separate matters here: (1) As manager he gets $600 a month. If other stores are opened he gets more a month. He bought and paid in cash at that time when this organization needed the money, was in debt, had no cash. He bought and paid for an interest in the business and I do not believe it is sound to say——

The Court: I don't follow that too closely. They owed $8,000 and according to the testimony they invested $42,000.

Mr. Bohn: Mr. Thompson testified that they owed $8,000 and they had $1,000 in the bank and that is all. That presupposes that the business got open; it presupposes that the creditors did not sue and attach the building; it presupposes that they were able to open the business and spend such other funds——

The Court: It presupposes that they were solvent; their assets were greater than their liabilities.

Mr. Bohn: Well, then we have the testimony what good does a franchise do to pay a bill?

The Court: Of course, you have the vitality to open a business. [370]

Mr. Bohn: And the cash.

The Court: That doesn't mean surely when you are opening up a business which has great attractions and you have your physical plant and all your

supplies and so forth that simply because you still owe money you can't open. Presumably a mortgage could be placed on the building, fixtures or anything else. I think I have covered that in my preliminary analysis. I certainly cannot concede that this store would not have opened except for Mr. Siciliano.

Mr. Bohn: Well, let's put it another way, your honor. In fact Mr. Siciliano bought and paid for a piece of property. I believe it is not sound that what we bought and paid for should be forfeited at any date prior to a date fixed by this court as the date of dissolution. I consider that any deprivation of this property prior to that date is a complete forfeiture and violation of the agreement of the parties..

The Court: In other words, it is your flat contention that Mr. Siciliano owed no obligation?

Mr. Bohn: It is my flat contention that Mr. Siciliano bought and paid for a half interest. He was obligated to manage the business in such time as might be mutually agreed upon between the parties and that for a period of a year and a half and more they corresponded to see if they could reach an agreement in view of Siciliano's absence. Apparently no exact agreement was reached and in the meantime Mr. Siciliano's organization [371] carried on the business.

Mr. Phelan: Have you got time, Judge, to continue?

The Court: I have ten minutes at this time then we will meet again at 1:30.

Mr. Phelan: I made notes on your comments and I am going to read the notes on some of them. I agree with the court's comments 100 per cent that it was the intention of the parties that Mr. Siciliano would manage the business. I believe it is also apparent from the testimony that back in 1952 Mr. Thompson was going to act as the continental purchasing agent and I believe the testimony is uncontradicted that he did that. Now I think there is no question from Mr. Thompson's testimony that he and through him the directors of the corporation were sold upon Mr. Siciliano's ability, and I think the court will take judicial notice of the fact that Mr. Siciliano demonstrated up until 1952 remarkable business ability. Then for some strange quirk or circumstance Mr. Siciliano suddenly dropped everything, got on an airplane and left the island for two years. Mr. Siciliano's bookkeeper, the bookkeeper of Pacific Enterprises, who was Mr. Siciliano's alter ego, has testified that he did not send Mr. Siciliano any reports whatsoever concerning the Dairy Queen during that two-year absence.

The Court: Nor did he hear anything from Mr. Siciliano asking for reports. He had no word from him at all.

Mr. Phelan: That is rather a strange way for a business [372] man to handle a business involving large sums of money. I think there is no question but that Mr. Thompson and the directors of American Pacific Dairy Products, Inc., leaned over backward to avoid injuring Mr. Siciliano in any way and to do everything possible to convince him that

he should come back to Guam and go into business. They were convinced his absence was not only hurting the business they were interested in, it wasn't doing his other business any good. I think the court will take judicial knowledge of that.

The Court: Of course, the court cannot take judicial notice of that.

Mr. Phelan: I think the court can, due to the numerous lawsuits in this court.

The Court: The court can take judicial notice there has been a lot of litigation.

Mr. Phelan: Now there is the question as to whether or not under Norman Thompson's management he did or didn't do as good as the management of Mr. Diza, etc. However, there has been evidence showing that certain expenses and obligations were not reflected in Mr. Diza's books, but there were certain expenses Mr. Thompson does show on his books that were not shown there, one is his own salary. Then there has been some testimony that the volume of business on this island has been on a decreasing scale for the last 18 months or two years. There has been a certain amount of that and it has been testified to. [373]

The Court: Obviously your profit goes down as the ratio of expense to total sales goes up. We were talking here about approximately the same volume of business in which event your observation would not be valid.

Mr. Phelan: But your fixed charges have increased on the books because certain charges like

Mr. Thompson's son's salary were not reflected in a comparable item on the books maintained by Mr. Henry Diza.

The Court: You have 6 or $700 a month which was not charged before.

Mr. Phelan: From testimony here Mr. Thompson, Mr. Edward Thompson, has agreed that invoices he sent from the States were reflected in Mr. Diza's books and he has agreed that he always eventually got the money for those to pay those invoices or the corporation got it and they were paid. However, he had to take those figures due to the cash operation of the business here. For many months he had no way of going beyond that to see what—and apparently the books did not reflect—during that period what should have been reflected in those books. There was no way of checking it because Mr. Diza did not reflect any charges for this addition down there and certain other items like that insofar as he only knew what was in the books, that is all. He could only prove what came to Seattle. He knew that definitely and he could go to the corporation. Now one of our defenses is failure of consideration. The method Mr. Diza adopted to keep [374] the books I don't think was good. We have had Mr. Norman Thompson's testimony as to the conditions he found in that store. Now that is a milk product. We are in the tropics. Good management, I would say, means high standards of sanitation and if in your mixing tank of your basic product you can find mold in there—milk is very dangerous—I think it shows that dur-

ing that period before Mr. Thompson got there, there wasn't any supervision down at the store. It is admitted that Mr. Siciliano didn't supervise. Actually who did? Mr. Diza paid the bills and the boys came down and ran the business. I don't think there is any question that there were thousands of dollars invested in this and that the corporation which is 6,000 miles away had to do something about it. They had started out with a partnership agreement. That is dangerous, very dangerous. The other partner can bind you. There was the practical question of what they were going to do. If they could get him back, good. If they couldn't, what were they going to do? It seems they took direction by their counsel in the States. I don't know; I have no way of knowing. I have no right to as how and why other attorneys at various stages in a long series of business transactions came to certain conclusions. I don't know the gentlemen that preceded my interest in this action. I agree with the court the dissolution paragraphs in that agreement have been completely disregarded by everybody. However, it was the opinion and advice of Stateside counsel of this corporation that there [375] had been abandonment. The contract had never been ratified. There was conditional ratification; the conditions were not complied with. Therefore they say, "We have some money you paid. We haven't got a contract. We have a moral obligation to return this money less any damages or sums of money you owe us," and that is, I think, basically why this corporation pursued the steps

they did. I don't pretend to know the law of the State of Washington, which isn't available on this island.

The Court: The State of Washington doesn't govern this.

Mr. Phelan: We must recognize that it was a Washington corporation and the acts of the corporation must, to a certain extent, be governed by the laws of that State.

The Court: Well, as far as certain powers are concerned, but if they come into Guam and do business they do business based on the laws of Guam.

Mr. Phelan: A foreign jurisdiction cannot extend powers; they can reduce the powers of a corporation but they can't spread them out; they are held down by their charter and their laws.

The Court: Correspondingly neither can they give power which the locality prohibits.

Mr. Phelan: They can't be expanded but they may be reduced in a foreign jurisdiction.

The Court: In the State of Nevada you have legalized gambling, but that doesn't entitle you to do it in Guam.

Mr. Phelan: My research indicates that the partnership [376] agreement was not specifically authorized by the statutes and I have serious doubts as to whether it would stand up. I don't think they are authorized to go into a partnership. I don't think an officer of a corporation is authorized to enter into a partnership by himself.

The Court: Yes, but the records show that it was entered into and that they approved it.

Mr. Phelan: We must not forget this fact: Mr. Siciliano was formerly dealing with this corporation, had been their agent on Guam, and that——

The Court: Now there were actually two series of negotiations. Now the court is going to recess until 1:30 this afternoon to continue this and I suspect it will take about an hour and at the expiration of arguments the plaintiff, Pacific Enterprises, should be prepared to proceed with its action.

Mr. Bohn: The other case to start this afternoon, your honor?

The Court: The second case, yes.

(The court recessed at 10:30 a.m. February 16, 1955, and reconvened at 1:30 p.m., February 16, 1955.)

The Court: Proceed, Mr. Phelan.

Mr. Phelan: I am taking up where I left off from notes I made this morning. I am not at all sure that I can agree as to the existence of a joint enterprise, though based upon your Honor's conception, it will be something akin. In other [377] words, two people were interested in a common thing. We do admit that there are some funds in there that are not our funds. I can't quite agree that the 1st day of July was the date that the American Pacific Dairy Products took effective control. I think it is approximately the 1st day of June, 1953, because by that time Norman Thompson was in control of the business.

The Court: Well, I am assuming that the corporation set up a new set of books as of that date, ceased to do business under the previous understanding, and that their new set of books was made effective as of the 1st of July, and during the month of June, of course, there were no reports made.

Mr. Phelan: Of course, the reports are just a compilation of the results of the daily transactions of the business.

The Court: Of course there were still services being performed, the warehousing and the continuance of employees.

Mr. Phelan: I don't know the date the warehousing ceased. Honestly, I don't know the exact date. Now with respect to profits, since there are items which do not appear in the books, no one here is in a position to say what the correct profit was for any one month, including the first month of operation. That will have to be determined by an accountant.

The Court: Yes, you will recall that I suggested that the court would have to have an accounting by a qualified accountant.

Mr. Phelan: The only qualified statement we have [378] is that no funds went to the States except money owed to the corporation or for the purpose of supplies. We have no exact statement of any other figures.

The Court: Well, we have a reasonably acceptable cumulative statement as of May 31.

Mr. Phelan: Yes, but the other testimony intro-

duced was, as I pointed out, we did not know what obligations may have existed as of that date.

The Court: I assume the only possible obligations are those involved in the next case, the case which was consolidated with this.

Mr. Phelan: We don't know of any, but I do admit that there has to be an adjustment because the books do not show it.

The Court: Obviously in a joint venture anything the joint venture owed at that time which was payable naturally cuts down on the profits.

Mr. Phelan: I think, basically, what transpired after the cut-off date is of no interest.

The Court: If my view is valid.

Mr. Phelan: Up to the cut-off date, yes, there has to be an accounting.

The Court: Yes.

Mr. Phelan: After the cut-off date if Mr. Siciliano is due $5.00 that he hasn't got, I think we have needlessly consumed time, asking about funds I don't think are in point. [379]

The Court: Do I understand the defense accepts the court's theory?

Mr. Phelan: To a certain extent. I can't say otherwise. We have never contended we don't owe him money. I question his rights to profits during the time he or his employees were in the business. What has he got coming? How much of those funds has he got coming to him? The only way you can determine that is by an accounting that I know.

The Court: Of course, I think we have to recognize we are dealing with a solvent operation as of

the 1st of July, 1953, and within the framework of that solvent operation through the use of his capital investment along with the corporation's plus the managerial service that was performed, profits were earned, and surely the corporation cannot be heard to say that they are entitled to all of those profits. In other words, we have no evidence of damage here. That may be a valid assumption, but it isn't anything we can tabulate as a legal definition, so with those factors involved, the capital plus the investment, minus one-half of any current obligations, obligations which were validly payable and which were not paid, which were incurred during that period and not paid, then I think you have the formula that I suggested. I merely throw that out as something that I would consider as representing an equitable adjustment.

Mr. Phelan: Well, I think, then—am I correct in assuming that the court feels the accounting problem is up to [380] the middle of 1953? That is the period that has to be accounted for?

The Court: Up to July 1, '53, and only up to that date.

Mr. Phelan: I think we wasted a lot of time discussing the financial transactions after that.

The Court: Well, not necessarily. We had to have the complete pattern before us because the corporation did take effective control and I have no evidence before me that Mr. Siciliano objected to that control or that he took any steps prior to September of '54, so I must assume a certain amount of acquiescence in the assumption of that exclusive

corporate control, and if that is correct then the joint venture ceased as of that time.

Mr. Phelan: I have two points I should like to call to the court's attention: First of all, there were certain leases which should be taken into consideration because they stand in the partnership's name.

The Court: Certain what?

Mr. Phelan: Leases on the lot down there.

The Court: Well, the lease on the lot, of course, is all part of the initial capitalization.

Mr. Phelan: True, but I mean the lease of record, the assignment of lease as recorded. Those things should not be forgotten, and I have one other thought based upon this whole thing and that is Mr. Siciliano left seven or eight days after [381] this agreement was signed and——

The Court: I think that is admitted.

Mr. Phelan: I have two matters that I would like to discuss with the court. I will not unduly prolong this proceeding by repeating any of the matters that were discussed before, but I am asking at this time, with the court's permission, for clarification on one or two items in accordance with the views heretofore expressed: In the accounting which the court suggested did the court have in mind that the accounting would be based on the assumption that the partnership was a valid joint venture during this period of time, an accounting on the original capitalization just as if this had continued as a partnership or joint venture?

The Court: That is correct and the court further assumes that you had a valid joint venture or part-

nership for our purposes and I don't think it makes too much difference that the corporation cannot be heard to say that that agreement was not valid during that period of time, having received benefits and having joined in the accomplishments which were done, but that as of July 1st you had a cessation of that relationship by corporate action not protested. In other words, one partner or one joint venturer found it necessary to take over the entire operation and to consider that the other party had failed in his obligation to the partnership, and I think, as I have said, I just don't see how—a two-people partnership or even joint venture involves a confidential relationship, one party to the [382] other. It isn't the normal transaction. You have got to have mutual confidence and trust and here you have a business operated by people who have no obligation to the corporation partner at all, not even employed by the corporate partner, but simply acting under what we would consider rather hazy instructions by Mr. Siciliano before he left.

Mr. Phelan: The second question which I had in mind—to let me further clarify, if I may, the reason for my first question—it is apparent from the testimony that certain adjustments were made in the books to fit into the corporate picture and I was requesting clarification——

The Court: I think those adjustments took place after the period to which I am referring.

Mr. Bohn: Well, they apparently predated them.

The Court: In other words, I think counsel should come to accord and acceptance of a formula.

It would not be too difficult to arrive at. You have only two months, only one month, actually, the month of June. It is the only month that we would have to consider in addition to your statement of May 31.

Mr. Phelan: Would not the basic figures from which all other figures were derived be the same adjustment or not?

Mr. Bohn: I was thinking in terms of——

The Court: In other words, you made a profit in June. Now, I think we have to consider that Norman Thompson's salary [383] had to be deducted from that June profit. The May profit ostensibly reflects it and since your sales were pretty much the same, I don't see how you can be far off, for example, in accepting the May figures as representative of the June figures.

Mr. Phelan: Well, they have figures for expenses for the month of June.

The Court: Well, the testimony was there was nothing unusual in June. The expenditures were pretty much set.

Mr. Phelan: The variation would normally only be in the amount of supplies you consume.

The Court: And the supplies in turn are reflected in your gross. If you paid out money for supplies in June either they were used or added to your inventory, which would show on your report.

Mr. Bohn: There is an additional question I would like to ask the court, with your permission. It bears not only on this case but the case to follow

and that is the court's views as to whether or not Mr. Siciliano or his organization would be entitled to payments, any payment, of that $600 per month salary for the period that they were in active management and prior to the date that Norman Thompson took over?

The Court: Yes, I can readily see the point that you are raising, but it seems to me that that depends upon what your corporation is able to prove in its claim.

Mr. Bohn: Now, for example, if I might proceed one step [384] further: We have in our corporation claim a statement for time for Mr. Meggo, a statement for some time for Mr. Viet. Now, should the court be disposed to agree that the total over-all managerial service was substantially performed during this period of time that the Siciliano organization was in control, then it would obviously be a duplication for us to ask for payments for Mr. Meggo and/or Mr. Viet. I do not mean to include in that the matter of trucking and that sort of thing, which they apparently started to pay for themselves later on.

The Court: Now, Mr. Bohn, the salary which was set up in the partnership agreement was to be paid to Mr. Siciliano. Now there is evidence here of Mr. Thompson's report to the directors that Mr. Siciliano advised him that there would be no salary charge during the period that he was absent.

Mr. Bohn: And we have made no claim for salary. However, if the court please, if I understand the court's present view, the services which

were contemplated were substantially performed during the period, at least running up until April of '53.

The Court: I think that is correct, Mr. Bohn, but in trying to equalize the contributions we have services being performed at the Seattle office for which no charge is made against the partnership. Now it isn't the fault of the corporation that Mr. Siciliano was unable to perform his duties. If no action was taken by them prior to April, in reliance upon his [385] assurance that the operation would continue and that he would not charge any salary, then I must assume that he expected to be compensated out of his share of the profits.

Mr. Bohn: And I do not—it has not been the theory——

The Court: You must remember also you have no evidence before me so far as personal services are concerned——

Mr. Bohn: Well, I concede to the court.

The Court: That any of these people who testified received any more for their additional work than they were receiving in turn from Pacific Enterprises.

Mr. Bohn: Well, if your honor please, I am not sure I can concur in that view.

The Court: Well, you will recall, Mr. Phelan asked the question as to whether you did this on your own and the manager, Mr. Meggo, testified that he was down there at all hours on his own. There was no testimony that he received any additional compensation as I understood their testimony.

Everybody did this work in addition to his normal work. They just added an additional burden to everyone who was involved.

Mr. Bohn: If your honor please, I did not intend—I am not sure I understand the situation. Here is a man—two people who bought an equal interest in a business. One of them kept it going for eleven months through his organization. He was not compensated. The other did some purchasing in the States. He has not asked for any compensation that I know. In your honor's [386] view of the case, we are going to forget one of the partner's interest completely, the value of a going business then earning about $2,000 a month? We are going to say that his employees, if they were not paid in addition to their normal wages, made no contribution even though for all we know other employees had to be hired to replace them?

The Court: Mr. Bohn, this court has been available to you most of this week where you could have shown any such understanding, but the defendant has shown that Mr. Siciliano said that while he was not present here he did not expect any salary to be collected.

Mr. Bohn: Does it follow from that that his managerial employees who were supervising should not be paid?

The Court: The corporation or the partners never had any contract with Pacific Enterprises, Inc.

Mr. Bohn: I thought we had a general understanding that this was a case where the individual

and his corporation were alter egos. At Mr. Phelan's own request we admitted that they were alter egos so that for all purposes they could be considered alike.

The Court: I do not see how you can consider a corporation, a legal entity, alike for all purposes. It has a different schedule of taxes, different authority, different powers. In other words, what I am saying is that this situation which was projected was not the fault of the corporate defendant. [387] Mr. Siciliano projected it by his inability to be present and to perform the functions. You say "Here we have accomplished this," but it is purely in the realm of conjecture as to how much more he might have accomplished had he been here.

Mr. Bohn: That gets back to the fundamental concept of what this contract means.

The Court: Well, I don't see how the contract could mean anything if it doesn't mean that Mr. Siciliano was to devote his time and energy.

Mr. Bohn: As much as might be agreed upon.

The Court: As much as might be agreed upon. You must remember that Mr. Thompson came out here, entered into this agreement in good faith and was not advised of any projected departure. He made all the arrangements for the operation, relied upon Mr. Siciliano to use his well-known talents and abilities, and while he thinks he is here taking care of their business, he is suddenly awakened at 3 o'clock in the morning and informed that Mr. Siciliano is in San Francisco. Now, just what do you think?

Mr. Bohn: I would like to know what we bought for $15,000?

The Court: You bought just exactly what you are getting. You bought the physical assets and you bought also the obligation to make a success of the business.

Mr. Bohn: Which I believe we have done. [388]

The Court: A partnership or joint venture which implied the personal assistance of one of the partners and that partner left the partner corporation here without any authorized contact, and you find on the other hand, and I think you should give a great deal of thought to that—it sems to me that Mr. Thompson went just about as far as he could to try and help Mr. Siciliano, try to keep this thing going, trying to keep everything going. In one of the communications here you find that he says to Mr. Turner, "Well, maybe we can appoint another manager if he doesn't get back." All this time he is attempting to get the continued assistance and interest of Mr. Siciliano, but where is Mr. Siciliano's interest? He gets no reports, he doesn't correspond with anyone; he is just gone.

Mr. Bohn: But the record also shows that reports were sent to Mr. Thompson, that correspondence was frequent between Mr. Thompson and Mr. Turner as well as Mr. Diza.

The Court: Well, Mr. Thompson, of course, testified that he set up the form of report which was apparently carried out but not currently. Now this is a peculiar type of business. In a matter of a

week or two serious things could happen. Certainly people sitting in Seattle were entitled by the 10th of a succeeding month to know what the preceding months' business reflected, not have to wait months and months for the posting of the books.

Mr. Bohn: Yet the testimony is that they are two months behind today as to postings of their books. [389]

The Court: Well, they at least know where they stand because they are one.

Mr. Bohn: They may know but they failed to advise Mr. Siciliano where they stood at any time after they took control.

The Court: I think that is in keeping with their assumption that Mr. Siciliano lost interest in the business.

Mr. Bohn: It is an assumption I feel that I cannot convince the court on this point—an assumption I cannot concur in. The business was run and managed. Mr. Edward Thompson said in response to a question of the court that frankly the second store wasn't opened because the reports were late, but regardless the fact is that the business was run and it made a profit.

The Court: The court has no evidence at all that the type of arrangement that was carried on was ever concurred in by the corporation. The testimony was that when Mr. Siciliano showed up in San Francisco on the 2d day of July he said he would be there not later than two months, that he would be there not more than two months and everything was running along splendidly. Now this is a busi-

ness. You can't run a business without having an active interested head. You can't run a business with a broken cash register for months. You can't run a business without having accurate control over your cash, without having accurate books kept currently. That way lies bankruptcy.

Mr. Bohn: In this particular case—— [390]

The Court: The only reason that you are here today is because it happened to be the type of business for which there was a particularly heavy public demand at the time it was undertaken. If this had been a department store I don't think either one of you would have been here because you wouldn't have any business in 1955.

Mr. Bohn: Well, I have made my presentation to the court. I find nothing additional which I could add that would add any weight to my previous arguments and therefore can do nothing but wait for the decision of the court.

The Court: Well, as I have indicated, this thing has not been firmed up in my thinking. All I have before me is citations of cases which I have had no opportunity to examine into. I haven't had the benefit of a legal brief on either side. I think at this time—I think at this time, and for working purposes I am firm, that Mr. Siciliano is entitled to judgment for an accounting, that he has a continuing lien upon the Dairy Queen for the amount which may be due him and a continuing lien upon the stock which was purchased out of profits for the payment of his judgment. I know I consider it highly impractical to attempt to take over this busi-

ness. I think Mr. Norman Thompson should continue to operate it as it has been operated with the understanding that all cash transactions will cover through the local account and that there shall be no money paid out of that account except for normal expenses. In other words, no [391] distribution of profits or surplus or anything of that kind. Do you agree to that?

Mr. Phelan: Well, there has been none anyway but money has to go to the States for the purchase of supplies, your Honor.

The Court: Well, normal expenses.

Mr. Phelan: There will be no dividends declared.

The Court: In other words I don't want to put this on a basis that either one of these parties has engaged or is interested in engaging in any sharp practice. I don't find that here. I find that these parties have acted with a high degree of integrity in their relationships to each other and I want that to continue. As I suggested, I think you should get together with me and agree upon an accountant unless you are willing to accept a formula which I am prepared to submit to you as representing a basis as of July 1st. I don't think it's a difficult matter at all.

Mr. Bohn: At the conclusion of your Honor's order in this matter I was going to ask if it might be possible for counsel to meet with the court in chambers to discuss some of these matters?

The Court: Yes, then are you prepared to go ahead with the Pacific Enterprises case?

Mr. Bohn: I could but I was prepared to do so at 2:30.

The Court: Do you want to meet with me now before you present the next case? [392]

Mr. Bohn: Yes.

The Court: Very well, the court will recess until approximately a quarter to three.

(The court recessed at 2:15 p.m., February 16, 1955.)

Thursday, February 17, 1955, 10:30 A.M.

The Court: I take it the parties wish to take up the matter of Pacific Enterprises, Inc., vs. American Pacific Dairy Products?

Mr. Bohn: That is correct, your Honor.

The Court: Very well. The court will make the following order in connection with Siciliano vs. American Pacific Dairy Products, Inc.: (1) The court finds that the plaintiff is entitled to an accounting from the defendant; (2) The court takes the matter under advisement to determine the period of time for which the plaintiff is entitled to an accounting, pending the filing of Findings of Fact, Conclusions of Law and the Judgment of the court; (3) The court finds that the plaintiff is entitled to have the assets of the defendant placed in the custody of the court pending final judgment. Norman Thompson is appointed the trustee for such assets pending final determination of the court, with in-

structions that the business is to be continued as at the present time, that no expenditures are to be made by him or by the defendant except expenditures essential to the continued operation of the business; that all funds received from gross [393] sales are to be deposited in the bank and withdrawn solely for the purpose of business operation; (4) The defendant is enjoined from disposing of its stockholdings, amounting to approximately 70 per cent, in the Guam Frozen Products, Inc., pending final judgment and determination of the court. Now is there any question about that order? The court reserves the right, as suggested, to appoint an accountant unless the parties will come to an agreement as to a satisfactory accountant to audit these books and to determine the amount, as shown by the books, to which the plaintiff is entitled in connection with the accounting.

Mr. Bohn: May I ask one question, your Honor? Will the other books of the corporation be made available for this accounting?

The Court: All books of the American Pacific Dairy Products, Inc., dealing with the financial transactions affecting the Dairy Queen must obviously be made available to the accountant in determining the respective amounts due the parties.

(The court then proceeded with the next case.) [394]

District Court of Guam,
Territory of Guam—ss.

I, Dorothy L. Wilkins, Official Court Reporter for the District Court of Guam, hereby certify the above and foregoing to be a true and correct transcript of the stenographic shorthand notes taken in the above-numbered case at the said time and place as set forth.

/s/ DOROTHY L. WILKINS,
Official Court Reporter. [395]

[Title of District Court and Cause.]

DOCKET ENTRIES

9-20-54:

1. Fld Complaint.
Issd Summons & 3 copies & 2 copies of Complaint to U.S. Marshal.

9-23-54:

2. Fld copy of Summons and served by US Marshal—Am Pac Dairy Products, Inc., et al.

10-13-54:

3. Filed Affid of service of Notice of Motion etc.—Am Pacific Dairy Products, Inc.

4. Filed Notice of Motion. Hng set for Oct 22—Am Pac Dairy, etc.

5. Filed sp appr & Mtn to Diss—Am Pac Dairy, etc.

10-13-54:

6. Filed Affidavit of Norman Thompson, (copy of).

7. Filed mtn for more definite statement & mtn to Strike—Am Pac Dairy, etc.

8. Filed memo of points & authorities of mtns of defts Am Pac Dairy—& Norman Thompson.

9. Filed Affid of service of Notice of Motion, etc.—Norman Thompson.

10. Filed Notice of Motion. Hng set for Oct 22—Norman Thompson.

11. Filed sp appr & mtn ti Diss—Norman Thompson.

12. Filed Affidavit of Norman Thompson.

13. Filed Affidavit of Finton J. Phelan, Jr.

14. Filed mtn for more definite statement—Norman Thompson.

15. Filed copy memo of points & authorities of mtns of defts Am Pac Dairy & Norman Thompson.

10-22-54—Hearing on Motions:

Arguments had. Mtn to Diss denied. Ct takes jurisd. Ct gnts other mtns in part. Pltf given 10 days to file Amend Complaint.

10-26-54:

16. Filed Amended Complaint.

11-5-54:

17. Filed Sp appear & Mtn to Diss. (Deft.)

18. Filed Mtn for Change of Venue, etc. (Deft.)

19. Filed Mtn for more Definite Statement & Mtn to Strike.

20. Filed Notice of Motions. Hng set for Dec 3.

12-3-54—Hearing:

Attys present. Arguments had. Deft's Mtns all denied. Deft given 20 days to answer.

12-23-54:

21. Filed Answer and Cross-Complaint.

22. Filed Affid of service of Ans & Cross-Complaint.

1-18-55:

23. Fld Notice of Taking Deposition.

24. Fld Notice to Take Deposition.

25. Fld Deposition Subpoena to Testify, etc., endorsed served Jan 17.

1-19-55:

26. Fld Reply to Counterclaim.

27. Fld Notice of Motion re tak of Dep of Edw Thompson. Hng set for Jan 28.

1-21-55—Forthwith Hearing:

Plaintiff appears by John A. Bohn, his attorney. Defendant appears by Finton J. Phelan, Jr., its attorney. By oral agreement between attorneys, statutory notice waived and hearing had forthwith. Pursuant to the provisions of Rule 30 (b) of the Federal Rules of Civil Procedure, Ordered that deposition of Edward Thompson be taken at 9:30 a.m. in the Legislative Building, Agana, Guam. Pre Tr Conf ord on Jan 26.

1-26-55—Pretrial Conference:

Attys for respective parties present. Action in Civ Case No. 68-54, Pacific Enterprises, Inc. vs. American Pacific Dairy Product, Inc. is consolidated with this action for purposes of trial and the two cases have been set for trial February 14. Pretrial order to be fld.

1-26-55:

28. Fld Pretr Ord.

1-27-55:

29. Fld copy of clk's ltr advising attys re filing of Pretr Ord & trial date.

2-2-55:

30. Fld Request for Admission of Facts.

2-4-55:

31. Fld Deposition of Edward Thompson.

2-9-55:

32. Fld Mtn to Amend Cross-Complaint.

33. Fld Amend Cross-Complnt.

34. Fld Mtn for Continuance.

35. Fld Mtn for Severance.

36. Fld demand for jury trial.

37. Fld Affid of Edward Thompson.

38. Fld Affid of Norman Thompson.

39. Fld Affid of Finton J. Phelan, Jr.

40. Fld Mtn to shorten time for hearing mtns.

41. Fld Notice of Motions for hearing on mtns filed this day.

42. Fld Ex Parte Ord set hng on Mtns for Feb 11.

2-10-55:

43. Fld Ojections ans Answers to Requests for Admissions.

44. Fld Notice of hng of objections & mtns pertinent thereto. Hng Feb. 11.

45. Fld Order allowing service of Notice & Objections prior to Feb. 10.

46. Fld subpoena to Produce—Joseph A. Siciliano.

47. Fld Dep subpoena to testify—Henry Diza.

2-10-55:

48. Fld Notice to Tak of Dep of deft—Siciliano.

49. Fld Notice of Tak of Dep of deft—Am Pac Dairy Prod.

50. Fld Affid of Serv of copy of Notice of Tak of Dep—Siciliano.

51. Fld Affid of Serv of copy of Notice of Tak of Dep—Diza.

2-11-55—Hearing on Motions: Hvng hrd arguments of attys for respective parties, Ct Ord that the following qtns in the Request for Admission of Facts, fld Feb 2 shld be answered: 1, 2, 3, 4, 5 & 16. Mtn to Amend and Mtn for Continuance were denied.

2-14-55—Trial:

Fld Pltf Exhs 1-6, inc. Evid taken until 5 p.m. Ct recessed until Feb 15 at 9:30 a.m.

2-15-55—Trial Resumed:

Tkng of evid on behalf of pltf cont'd until pltf rested. Deft mvd for dismsl; mtn denied. Fld Deft Exhs A-L, inc., & Pltf Exh 7. Evid taken on behalf of deft until 5 p.m. Ct recessed until Feb 16 at 9 a.m.

2-16-55—Trial Resumed:

Tkng of evid on behalf of deft cont'd & on

cross-exam Addendum to Deft Exh I was offrd in evid & was acceptd w/o lbj & fld. At conclusion of evid, defense rested. Ct ord Deft's Counter-claim dismsd. No rebuttal testimony. Ct expressed his oral opn stating that it was not the Ct's judgt or the Ct's findings of fact. Arguments presented until 2:20 p.m. Ct recessed until Feb 17 at 10:30 a.m.

2-17-55—Trial Resumed:

Ct made the following order in connection with Siciliano vs. American Pacific Dairy Products, Inc.: (1) The Court finds that the plaintiff is entitled to an accounting from the defendant; (2) The Court takes the matter under advisement to determine the period of time for which the plaintiff is entitled to an accounting, pending the filing of findings of fact, conclusions of law and the judgment of the Court; (3) The Court finds that the plaintiff is entitled to have the assets of the defendant placed in the custody of the Court pending final judgment. Norman Thompson is appointed the trustee for such assets pending final determination of the Court with instructions that the business is to be continued as at the present time, that no expenditures are to be made by him or by the defendant except expenditures essential to the continued operation of the business; that all funds received from gross sales are to be deposited in the bank and withdrawn solely for the purpose of business operation; (4) The defendant is en-

joined from disposing of its stockholdings, amounting to approximately 70 per cent, in the Guam Frozen Products, Inc., pending final judgment and determination of the Court.

2-18-55:

51a. Fld receipt for Deft Exhs from Mr. Thompson, trustee.

52. Filed Interlocutory Judgment.

3-2-55:

53. Filed Opinion.

3-4-55:

54. Filed copy of clk's ltr of transm of copies of Opinion to attys.

3-19-55:

55. Filed Notice of Appeal from Interl Decree of 1-18-55.

56. Filed Bond for costs on appeal.

3-22-55:

57. Filed copy of ltr of transm of notice of appeal to atty for pltf.

3-25-55:

58. Filed Stip Ext time to file Fs of F, Cs of L, Decree Ord. to 10 days from March 23, Approved by Ct.

4-7-55:

59. Filed Suppl Fs of F, Cs of L.

60. Filed Judgt for pltf for $38,023.31 & costs.

61. Filed copy of Notice to attys of Judgt.

4-14-55:

62. Filed pltf's Memo of costs & Disbursements.

4-18-55:

63. Filed deft's mtn for fixing supersedeas bond. Mtn approved for $40,000 bond.

4-21-55:

64. Filed Motion for extention of time for docketing & filing record on appeal to June 10, 1955. So ordered by Ct.

4-25-55:

65. Attys notified on taxing of costs 4-29-55 at 9:00 a.m.

4-29-55—Forthwith Hrng for Reset:

Ord hrng for taxing of costs set for May 6.

4-30-55:

66. Fld Notice of Appl.

5-2-55:

67. Fld copy of clk's ltr advsng atty for pltf of Notice Appl.

68. Fld Supersedeas Bond, duly executed & appvd by Ct.

5-5-55:

69. Fld pltf's Notice of Appl.

5-6-55:

70. Fld copy of clk's ltr advsng atty for deft of Notice of Appl.

Hng on Tax of Costs:

Attys present. Ct disallows items 6 & 8 of Bill of costs. Costs txed in sum of $60.45.

5-25-55:

71. Fld Ord Taxing Costs.

6-4-55:

72. Fld Pltf's Bond for Costs on Appl.

6-7-55:

73. Fld deft's mtn & Ct Ord extending for 15 days the time within which to docket & file record on appl.

6-20-55:

74. Fld Statement of Points on which appellant intends to Rely.

75. Fld Designation of Contents of record on appeal.

76. Fld Court Reporters Transcript of Proceedings in 4 volumes.

77. Fld copy of Ans to Requests for Admissions.

(A true copy.)

[Seal] /s/ ROLAND A. GILLETTE,
Clerk.

[Title of District Court and Cause.]

Minutes

10-13-54:

A Motion to Dismiss, Motion to Strike and Motion for More Definite Statement, having been filed this day by the defendant American Pacific Dairy Products, Inc., Ordered hearing on motions set for hearing on Friday, October 22, 1954, at 9:30 a.m.

A Motion to Dismiss, Motion to Strike and Motion for More Definite Statement, having been filed this day by the defendant Norman Thompson, Ordered hearing on motions set for hearing on Friday, October 22, 1954, at 9:30 a.m

10-22-54—Hearing on Motions:

Plaintiff appears by John A. Bohn, his attorney. Defendants American Pacific Dairy Products, Inc., and Norman Thompson appear by Finton J. Phelan, Jr., their attorney.

Having heard the arguments of the attorneys, court denies motion to Dismiss and holds it has jurisdiction in the First cause of action over the defendants served and further holds that Second cause of action does not state a cause of action. Plaintiff given ten (10) days in which to file an Amended Complaint.

11-5-54:

Notice of Motions to Dismiss, Change of Venue, More Definite Statement, and to Strike having been filed this day, Ordered that hearing on said motions be had on Friday, December 3, 1954, at 9:30 a.m.

12-3-54—Hearing:

Plaintiff appears by John A. Bohn, his attorney. Defendant appears by Finton J. Phelan, Jr., its attorney. Having heard the arguments of the attorneys for the respective parties, Ordered defendant's Motion to Quash, Motion for Change of Venue and Motion for More Definite Statement, all denied. Defendant given twenty (20) days in which to answer.

1-19-55:

Notice of Motion to vacate notice of taking of deposition of one Edward Thompson, having been filed this day, Ordered hearing on said motion be had on Friday, January 28, 1955, at 9:30 a.m.

1-21-55:

Plaintiff appears by John A. Bohn, his attorney. Defendant appears by Finton J. Phelan, its attorney. By oral agreement between attorneys, statutory notice waived and hearing on defendant's motion had forthwith. Court grants motion and orders deposition of one Edward Thompson be taken at 9:30 a.m. Tuesday, January 25, 1955, in the Legislative Building, Agana, Guam, pursuant to the provisions of Rule 30 (b) of the Federal Rules of Civil Procedure. Ordered Pretrial Conference set for Wednesday, January 26, 1955, at 9:30 a.m.

1-26-55—Pretrial Conference:

Plaintiff appears by John A. Bohn, his attorney. Defendants appear by Finton J. Phelan, Jr., their attorney. The action in Civil Case No. 68-54, Pacific Enterprises, Inc., vs. American Pacific Dairy Products, Inc., is consolidated with this action for purposes of trial and the two cases have been set for trial Monday, February 14, 1955, at 9:30 a.m. Pretrial order to be filed.

2-10-55:

Ordered hearing on all motions filed on February 9th and 10th be had on Friday, February 11, 1955, at 9:30 a.m.

2-11-55—Hearing on Motions:

Having heard the arguments of the attorneys for the respective parties, the Court Ordered that the following questions in the Request for Admission of Facts, filed February 2, 1955, should be answered: 1, 2, 3, 4, 5 and 16. Motion to Amend and Motion for Continuance were denied.

2-14-55—Trial:

Plaintiff appeared in person and with John A. Bohn, his attorney.

Defendant appeared by Edward Thompson and with Finton J. Phelan, Jr., its attorney.

Court directed all witnesses to remain outside the courtroom until called upon to testify, except one (1) witness for the plaintiff.

Thereupon came the evidence on behalf of the plaintiff and certain documents marked plaintiff Exhibits 1 through 6, inclusive, were offered in evidence and were accepted without objection and filed. Taking of evidence continued until the hour of 5:00 o'clock p.m. Court recessed until the following day, Tuesday, February 15, 1955, at the hour of 9:30 o'clock a.m.

2-15-55—Trial Resumed:

All parties present as heretofore. Taking of evidence on behalf of the plaintiff continued and at the conclusion of the evidence the plaintiff rested. Defendant through its attorney moved for dismissal. Motion was denied. Thereupon came the evidence on behalf of the defendant and certain documents marked Defendant Exhibits A through F, inclusive, and H through L, inclusive, were offered in evidence and were accepted without objection and filed; a certain document marked Defendant Exhibit G was offered in evidence and was accepted with a stipulation and filed. On cross-examination a certain document marked Plaintiff Exhibit 7 was offered in evidence, objected to, and was accepted over the objection and filed. Evidence taken until the hour of 5:00 o'clock p.m. Court recessed until the following day, Wednesday, February 16, 1955, at the hour of 9:00 o'clock a.m.

2-16-55—Trial Resumed:

All parties present as heretofore. Taking of evidence on behalf of the defendant continued and certain document marked Addendum to Defendant Exhibit I was offered in evidence and was accepted without objection and filed. At the conclusion of the evidence, the defense rested. The Court Ordered that the Defendant's Counterclaim be and it hereby

is dismissed. No rebuttal testimony. The Court expressed his oral opinion stating that it was not the Court's judgment or the Court's findings of fact. Arguments presented until hour of 2:20 o'clock p.m. Court recessed until the following day, Thursday, February 17, 1955, at the hour of 10:30 o'clock a.m.

2-17-55—Trial Resumed:

All parties present as heretofore. The Court made the following order in connection with Siciliano vs. American Pacific Dairy Products, Inc.: (1) The Court finds that the plaintiff is entitled to an accounting from the defendant; (2) The Court takes the matter under advisement to determine the period of time for which the plaintiff is entitled to an accounting, pending the filing of findings of fact, conclusions of law and the judgment of the Court; (3) The Court finds that the plaintiff is entitled to have the assets of the defendant placed in the custody of the Court pending final judgment. Norman Thompson is appointed the trustee for such assets pending final determination of the Court with instructions that the business is to be continued as at the present time, that no expenditures are to be made by him or by the defendant except expenditures essential to the continued operation of the business; that all funds received from gross sales are to be deposited in the bank and withdrawn solely for the purpose of business operation; (4) The

defendant is enjoined from disposing of its stockholdings, amounting to approximately 70 per cent, in the Guam Frozen Products, Inc., pending final judgment and determination of the Court.

The following named persons were duly sworn and testified during the course of the trial:

For the Plaintiff

1. Joseph A. Siciliano.
2. Joseph Meggo.
3. Edward Thompson.
4. Ernesto O. Diza.

For the Defendant

1. Edward Thompson.
2. Norman Thompson.

4-29-55—Forthwith Hearing for Resetting:

Plaintiff appeared by J. J. Novak, his attorney. Defendant appeared by Finton J. Phelan, Jr., its attorney. Having heard the attorneys for the respective parties, the Court Ordered that hearing for the purpose of determining costs be set for Friday, May 6, 1955, at 9:30 a.m.

5-6-55—Hearing on Taxation of Costs:

Plaintiff appears by J. J. Novak, his attorney. Defendant appears by Finton J.

Phelan, Jr., his attorney. Having heard the arguments of the attorneys for the respective parties, court disallows items No. 6 and 8 of the Bill of Costs filed on April 14, 1955, and taxes costs in the sum of sixty and 45/100 dollars ($60.45).

(A true copy.)

[Seal] /s/ ROLAND A. GILLETTE,
Clerk.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Roland A. Gillette, Clerk of the District Court of Guam for the Territory of Guam, M. I., do hereby certify that the following documents, to wit:

1. Complaint, filed September 20, 1954.
2. Special appearance and Motion to Dismiss, filed October 13, 1954.
3. Amended Complaint, filed October 26, 1954.
4. Special Appearance and Motion to Dismiss, filed November 5, 1954.
5. Motion for Change of Venue on the ground of convenience of parties and witnesses in the interest of Justice, filed November 5, 1954.
6. Motion for More Definite Statement and Motion to Strike, filed November 5, 1954.
7. Answer and Cross-Complaint, filed December 23, 1954.

8. Reply to Counterclaim, filed January 19, 1955.

9. Pretrial Order filed January 26, 1955.

10. Request for Admission of Facts, filed February 2, 1955.

11. Amended Cross-Complaint, filed February 9, 1955.

12. Demand for Jury Trial, filed February 9, 1955.

13. Objections and Answers to Requests for Admission, filed February 10, 1955.

14. Interlocutory Judgment, filed February 18, 1955.

15. Opinion, filed March 2, 1955.

16. Notice of Appeal, filed March 19, 1955.

17. Supplemental Findings of Fact and Conclusions of Law, filed April 7, 1955.

18. Judgment, filed and entered April 7, 1955.

19. Motion to Stay, filed April 18, 1955.

20. Notice of Appeal, filed April 30, 1955.

21. Supersedeas and Cost Bond on Appeal, filed May 2, 1955.

22. Notice of Appeal, filed May 5, 1955.

23. Order: Taxing Costs, filed May 25, 1955.

24. Bond for Costs on Appeal, filed June 4, 1955.

25. Statement of Points on which Appellant Intends to Rely, filed June 20, 1955.

26. Designation of Contents of Record on Appeal, filed June 20, 1955.

27. Answers to Requests for Admission, filed June 23, 1955.

28. Certified copy of the Docket entries.

29. Certified copy of Clerk's Minutes.

30. Court Reporter's Transcript of Proceedings, volumes "A," "B," & "C," filed June 20, 1955, are the original or certified copies of the original documents filed in the office of the clerk in the above-entitled case.*

In Witness Whereof, I have hereunto subscribed my name and affixed the Seal of the aforesaid court at Agana, Guam, M. I., this 23rd day of June, A.D. 1955.

[Seal] /s/ ROLAND A. GILLETTE,
Clerk of the Court.

[Endorsed] No. 14805. United States Court of Appeals, for the Ninth Circuit. American Pacific Dairy Products, Inc., a Corporation, Appellant, vs. Joseph A. Siciliano, Appellee. Joseph A. Siciliano, Appellant, vs. American Pacific Dairy Products, Inc., a Corporation, Appellee. Transcript of Record. Appeals from the District Court for the District of Guam, Territory of Guam.

Filed: June 25, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

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*Exhibits set forth on Supplemental Certificate.

In the United States Court of Appeals
for the Ninth Circuit

Nos. 14805 and 14806

AMERICAN PACIFIC DAIRY PRODUCTS, INC., a Corporation,

Defendant-Appellant,

vs.

JOSEPH A. SICILIANO,

Plaintiff-Appellee.

and

AMERICAN PACIFIC DAIRY PRODUCTS, INC.,

Defendant-Appellant,

vs.

PACIFIC ENTERPRISES, INC.,

Plaintiff-Appellee.

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY AND DESIGNATION OF THE RECORD TO BE PRINTED

Appellant in the above-entitled causes hereby adopts as its statement of points on which it intends to rely in this appeal the statement of points as they now appear in the transcript of the records filed herein.

Appellant hereby designates for printing the entire certified transcript of the records save and except that portion which covers the exhibits.

Dated this 1st day of July, 1955.

/s/ BURLMAN ADAMS, of

LITTLE, LeSOURD, PALMER, SCOTT & SLEMMONS,
Attorneys for Appellant.

FINTON J. PHELAN, JR.,
Attorney for Appellant.

Service of copy acknowledged.

[Endorsed: Filed August 10, 1955.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS UPON WHICH PLAINTIFF-APPELLEE AND CROSS-APPELLANT INTENDS TO RELY AND DESIGNATION OF RECORD

Plaintiff-Appellee and Cross-Appellant in the above-entitled causes hereby adopts as its statement of points on which it intends to rely in this appeal, the statement of points as they now appear in the transcript of the record filed herein.

The Defendant-Appellant and Cross-Appellee has already designated the entire certified transcript of the record save and except that portion which covers

the exhibits, and therefore, Plaintiff-Appellee and Cross-Appellant does not designate any portion of the Record for printing.

Dated this 7th day of September, 1955.

/s/ JOHN A. BOHN,
Attorney for Plaintiff-Appellee and Cross-Appellant.

[Endorsed]: Filed September 8, 1955.

No. 14806

United States
Court of Appeals
For the Ninth Circuit.

AMERICAN PACIFIC DAIRY PRODUCTS, INC.,

Appellant,

vs.

PACIFIC ENTERPRISES, INC., a Corporation,

Appellee.

Transcript of Record

Appeal from the District Court for the District of Guam, Territory of Guam.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—11-4-55

No. 14806

United States
Court of Appeals
For the Ninth Circuit.

AMERICAN PACIFIC DAIRY PRODUCTS, INC.,

Appellant,

vs.

PACIFIC ENTERPRISES, INC., a Corporation,

Appellee.

Transcript of Record

Appeal from the District Court
for the District of Guam,
Territory of Guam.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—11-4-55

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

LITTLE, LeSOURD, PALMER, SCOTT & SLEMMONS,
1510 Hoge Bldg.,
Seattle, Washington;

FINTON J. PHELAN, JR., ESQ.,
201 Mesa Bldg.,
Agana, Guam.,

For the Appellant.

JOHN A. BOHN, ESQ.,
P. O. Box 771,
Agana, Guam.;

WALTER S. FERENZ,
903 First St.,
Benicia, California,

For the Appellee.

In the District Court of Guam
In and for the Territory of Guam

Civil Case No. 68-54

PACIFIC ENTERPRISES, INC.,

Plaintiff,

vs.

AMERICAN PACIFIC DAIRY PRODUCTS, INC., and JOSEPH SICILIANO, Co-Partners Doing Business Under the Firm Name and Style of DAIRY QUEEN OF GUAM,

Defendants.

COMPLAINT

The Plaintiff complains of the Defendant and for cause of action alleges:

I.

That the Plaintiff is a corporation duly organized and existing under and by virtue of the laws of the Territory of Guam.

II.

That the demand herein exclusive of interest and costs amounts to more than Two Thousand Dollars ($2,000.00) and that the court has jurisdiction under Section 62 of the Code of Civil Procedure of Guam.

III.

That the Defendant owes the Plaintiff the sum of Thirteen Thousand, Eight Hundred Seventy Dollars and Forty-Eight Cents ($13,870.48) according to the account hereto annexed as Exhibit "A."

Wherefore, Plaintiff demands judgment against the defendants for the sum of Thirteen Thousand, Eight Hundred Seventy Dollars and Forty-Eight Cents ($13,870.48) together with interest thereon and costs and for such other relief as to the court shall deem meet.

/s/ JOHN A. BOHN,
Attorney for Plaintiff.

/s/ ROBERT E. DUFFY,
Resident Counsel.

EXHIBIT "A"

Pacific Enterprises, Inc.
P. O. Box 338
Tamuning, Guam, M. I.

Statement

March 31, 1954.

To: American Dairy Products, Inc.,
Anigua, Guam, M. I.

Balance forward, as of July, 1953		$12,607.13
Additional Charges:		
Schedule—I	$ 975.85	
Schedule—II	67.30	
Primitivo de Aquino Differential Pay	90.00	
Employees Clearances	130.20	1,263.35
Total		$13,870.48

Exhibit "A"—(Continued)

August 1, 1953.

To: American Dairy Products, Inc.,
Anigua, Guam, M. I.

Incurred from 22 June, 1952, to 31 July, 1953

I.	Subsistence	$ 2,031.30
II.	Housing facilities	398.00
III.	Transportation	600.00
IV.	Rent for reefer truck	1,012.50
V.	For hauling supplies	146.25
VI.	Deliveries of supplies to Dairy Queen	146.25
VII.	For storage of supplies	361.70
VIII.	For freezing	77.00
IX.	For maintenance	616.07
X.	Supplies issued to Dairy Queen, Pacific Enterprises' own stock	160.02
XI.	Other expenses	24.11
XII.	Equipments owned by Pacific Enterprises, Inc.	771.60
XIII.	Other salaries	3,966.65

Cost of Additional Store:

I.	Labor	1,433.44
II.	Materials used	1,928.52
	Total amount owing us	**$13,673.41**
	Less: Mdse. bought from Dairy Queen	1,066.28
	Balance due us, end of July, 1953	$12,607.13

Exhibit "A"—(Continued)

Expenses to Be Accounted for and Reimbursed to Pacific Enterprises, Inc.

From: Pacific Enterprises, Inc.,
P. O. Box 338, Agana,
Guam, M. I.

To: American Pacific Dairy Products, Inc.,
Anigua, Guam, M. I.
Incurred from June 22, 1952, to July 31, 1953

I. Subsistence:
(From June 22, 1952, to Oct. 31, 1952, 130 days):
For: 1. Tony Toquero at $1.45/head/day, for (3) $ 565.80
2. Wilfredo Pisuena
3. Teofilo Ceraos

(From Nov. 1, 1952, to Jan. 31, 1953, 92 days):
For: 1. Tony Toquero at $1.45/head/day 400.20
2. Wilfredo Pisuena
3. Feliciano Rapiz

(From Feb. 1, 1953, to July 31, 1953, 182 days):
For: 1. Tony Toquero at $1.45/head/day 1,055.60
2. Wilfredo Pisuena
3. Feliciano Rapiz
4. Premitivo de Aquino

II. Housing for above employees:
(From June 22, 1952, to July 31, 1953):
At $3.00/month (for 13 months and 8 days) 398.00

III. Transportation:
Roundtrip ticket, for (3) at $200.00 ..... 600.00

IV. Rent for reefer truck:
(From June 22, 1952, to July 31, 1953, 405 days):
Storage for pints and quarts (ice cream) at $2.50/day 1,012.50

V. For hauling supplies:
(From Commercial Dock to P.E.I. Warehouse, Tamuning):
Extracted from only available stock record, P.E.I. Total wts. of supplies hauled in—117,198 lbs. or (58½ tons) at the rate of $2.50/ton 146.25

Exhibit "A"—(Continued)

VI. Deliveries of supplies to Dairy Queen:

From P.E.I. Warehouse, Tammuning, to Dairy Queen's Store at the rate of $2.50/ton 146.25

VII. For storage of supplies:

Warehouse and air-conditioned storage—at $35.00 per month or $1.70/day (includes storekeeper's salary—from June 22, 1952, to April 2, 1952, 10 months and 8 days) 361.70

VIII. For Freezing:

Frozen strawberries at $7.50/month from June 22, 1952, to April, 1953 (10 months and 8 days) 77.00

IX. For maintenance:

1. Electrician, $1.082/hr., 70 hrs. 75.74
2. Reefer mech. "A," $1.444/hr., 3 hrs. 4.33
3. Reefer mech. "B," $1.444/hr., 196 hrs. 283.00
4. Garbage hauler, $1.00/day, 253 hrs. 253.00

X. Supplies issued to Dairy Queen from Pacific Enterprises' own stock:

Qty.	Description	Unit Price	
1 gal.	Grounded nuts, $3.00/gal.	.....	3.00
2 gals.	Imitation vanilla flavoring, $1.43/gal.	.....	2.86
5 rolls	Mulch paper, 16x36, $3.80/roll	.....	19.00
12 pcs.	Plywood, 4x8x1/4, $6.50/pc.	.....	78.00
2 ea.	Scoop "Sugar," 2 lbs., $1.50/ea.	.....	3.00
2 cans	DDT, 10 lbs., ea., 98c/can	.....	1.96
2 ea.	Brooms, light, $1.75/ea.	.....	3.50
94 cans	Old Dutch Cleanser—48/cs., $5.85/cas.	.....	11.47
200 lbs.	Granulated sugar, 11c/lb.	.....	22.00
1/2 gal.	Clorox, 50c/qt.	.....	2.00
200 ea.	Lily Cups, 8 oz. size, $1.12 1/4/100	.....	2.23
4 boxes	Eagle straws, 8 1/2-inch, $1.50/box	.....	6.00

XI. Other expenses:

Lacquer, dark paint, 1 gal. 5.45
6 60-watt bulbs ..... .66
2 loads crushed corals (used in leveling front lot of store), $9.00/load 18.00

Exhibit "A"—(Continued)

XII. Equipments owned by Pacific Enterprises, Inc.:

1-ea.	¾ hp motor (Westinghouse)	70.00
1-ea.	Hot fudge heater	101.00
2-ea.	Universal condenser	25.00
2-ea.	Blower	45.60
1-ea.	Air cooler evaporator	150.00
2-ea.	Electric fans	30.00
1-ea.	Deep freeze 1hp	300.00
1-ea.	Carrier compressor, installed to walk-in reefer	50.00

XIII. Other salaries:

1. E. O. Diza (commencing from June 22, 1952, to March, 1953)	1,423.61
2. G. C. Balmonte	90.97
3. W. L. Veit	439.93
4. J. Meggo	2,012.14

Cost of Additional Store to D. Q.'s Former Bldg.

From: Pacific Enterprises, Inc.
P. O. Box 338, Agana,
Guam, M. I.

To: American Dairy Products, Inc.,
Anigua, Guam, M. I.
(Completed in 40 days period, commencing July 1, 1952)

I. Labor—Direct:

1. Simeon Bandong, 40 days at $4.167/day	$ 166.68
2. Mariano Vinoya, 40 days at $4.167/day	166.68
3. Celestino Vinoya, 40 days at $3.334/day	133.36
4. E. Sibonga, 40 days at $4.167/day	166.68

Labor—Indirect:

1. A. Padua, foreman, 40 days at $11.667/day	466.68
2. P. Trapta, asst. foreman, 40 days at $8.334/day	333.36

Exhibit "A"—(Continued)

II. Materials used:

Wood for roofing support, 65.33 bd. ft. at 17c bd. ft.	11.11
Plywood, 4x1/4, 27-ea. at $6.50 ea.	175.50
Solid door, 1-ea.	12.50
Cellotex, 8-pcs. at $2.00 ea.	16.00
Panel-sidings, 3'10"x6'6", 6-ea. at $50.00 ea.	300.00
Panel (unit), 3'10"x6'6", 2-ea. at $15.00 ea.	30.00
Screen door, 2-ea. at $4.50 ea.	9.00
Septic tank	800.00
PCC Invoices (see Schedule "A" attached)	138.32
Calvo Invoices (see Schedule "B" attached)	52.65
Pedros Invoices (1 gal. aniteEnamel paint, attached)	5.50
Marsport Invoices (see Schedule "C" attached)	127.69
Crushed coral, 3 loads, (see Schedule "D" attached)	27.00
Bags cement, 95-ea.	223.25

Explanation, Item I—Subsistence:

(a) per head/day, $1.45

Breakfast	$0.35
Lunch	.50
Dinner	.60

Explanation, Item V—For hauling supplies:

Per P.E.I. store-room available record on goods hauled-in, for Dairy Queen:

1. All cases "toppings," except "marshallow," estimated at 50 lbs./cs. marshallow at 31 lbs./cs.:

   Total number of cases at 50 lbs., 365—18,250 lbs.
   Total number of cases at 31 lbs., 8—248 lbs.

2. All ice cream mixes, estimated at 772 lbs./drum except of 1952, which is estimated at 300 lbs./drum:

   Number of drums at 300 lbs., 84—25,200 lbs.
   Number of drums at 275 lbs., 247—67,925 lbs.
   Number of drums at 125 lbs., 5—625 lbs.
   (Deviluxe)

Exhibit "A"—(Continued)

3. All can, frozen strawberry at 30 lbs./can, 165 cans—4,950 lbs.:

   Total wts., 2,000—1 ton, 117,198 lbs. or 58¼ tons, at $2.50/ton—($146.25).

   Note: All supplies hauled-in, such as jiffy bags, other bags, cones, cups, spoons, etc., expense on said items has not been accounted for in this report.

Explanation, Item VI—Deliveries of supplies to Dairy Queen store; (from warehouse at Tamuning):

Total wts. of Item V, has been conformed to same rate for 58½ tons—supplies at $2.50/ton—($146.25).

Explanation, Item XIII—Other salaries:

1. E. O. Diza, for keeping books of Dairy Queen, commencing June 22, 1952, to March 31, 1953, (for 3 hrs./day at $1.683/hr.). Period covered—9 months and 8 days. Total hours—846—($1,423.61).

2. G. C. Balmonte, for working night-time at Dairy Queen 2 weeks in August, 1952, from 6 p.m. to 12 midnight and 1 week in September, 1952, replaced T. Ceraos during sickness. Total hours—126 at .733c/hr.—($90.97).

3. Mr. W. L. Veit, for 2 months administration from September to October, approximately 3 hours per day at $2.404/hr.—($439.93).

4. Mr. J. Meggo, for changing banks and taking the readings daily and extra work of 2 hours in the store daily. Period covered, from June 22, 1952, to March, 1953. Fixed hours consumed—3 hrs./day, and to include time for hauling supplies for Dairy Queen. Total hours at $2.404/hr. (Note: Meggo's work to end March 27, 1953) ($2,012.14).

Exhibit "A"—(Continued)

Schedule "A"

Explanation, Item II—

Bulletin red paint, 1 pt.	$ 1.07
Indian red, 1 pt.	1.07
Trulike white paint, 1 gal.	5.76
Coloring, dark yellow, 1 gal.	1.25
Paint brush, 1 ea.	.85
Cabinet pall, 4 ea.	2.60
Paint thinner, 1 gal.	.95
Colorizer, paint white, 1 gal.	5.76
Enamel, dark, 1 gal.	6.05
100 per cent pure white paint, 2 gals.	11.52
Bar top varnish, 1 qt.	1.52
Chromium metal moulding, 24 ft. at 22c	5.28
1x1 brass hinges, 7 pairs at 15c	1.05
Corner brass, 2 pcs. at 15c	.30
Brass screws, 4 doz. at 10c	.40
¼ round wire, 50 ft. at 5c	2.50
Gate valve, 2 ea. at $3.55	7.10
Enamel paint, 2 gals. at $7.58	13.05
Bungalow paint, 3 gals at $3.00	9.00
Interior gross, 2 gals. at $5.76	11.52
Paint thinner, 2 gals. at 95c	1.90
Hack saw blade, 12 ea. at 15c	1.80
Flush tungzel switch, single pole, 2 ea. at 35c	.70
Friction tape, 6 ea. at 70c	4.20
Gross iron wood screws, 1 ea.	1.20
Bungalow paint, 5 gals. at $2.90	14.50
Bungalow paint, 3 gals. at $3.00	9.00
Boneplelack colors, 2 cans at 53c	1.06
Ultra-blue, 3 cans at 75c	2.85
Paint deluxe, 1 cs.	1.29
Turpentine, 1 gal.	3.00
Paint thinner, 3 gals. at 95c	2.85
2x12/x14 wood, 1 pc. at 18c	5.04
Paint brush, 1 ea.	1.10
Royal blue paint, 3 qts. at $2.40	7.20
Sandpaper, 24 ea. at 3c	.72

Exhibit "A"—(Continued)

Plastic wood, 1 ea. at 40c	.40
1-inch hinges, 4 pairs at 15c	.60
Drawers pull, 2 ea. at 25c	.50
Drawers pull, 2 ea. at 65c	1.30
Total amount	$ 148.81
Less: Discount	11.49
Balance of amount	$ 138.32

Schedule A-1

Additional charges:

A) Subsistence, adjustment		$ 975.85
1. Tony Toquero $1.45/head/day, from August 1, 1953, to February 5, 1954, (189 days).	$ 274.05	
2. W. Pisuena $1.45/head/day, from August 1, 1953, to March 31, 1954, (242 days).	350.90	
3. F. Rapiz $1.45/head/day, from August 1, 1953, to March 31, 1954, (242 days).	350.90	
B) Housing, adjustment		67.30
1. Tony Toquero $3.00/mo., (6 mo. & 9 days).	18.90	
2. F. Rapiz $3.00/mo., (8 mo. & 2 days).	24.20	
3. W. Pisuena $3.00/mo. (8 mo. & 2 days).	24.20	

Exhibit "A"—(Continued)

C) Salary, differential:

P. de Aquino: Base pay should be $75.00—previous salary drawn at $60.00/mo. only—Difference ($15) (period from Feb. 1 to July 31, 1953).

D) Charges on employees clearances 130.20

1. F. Rapiz		51.35
For: a) Passport	$27.50	
b) N.B.I.	1.25	
c) Visa	10.10	
d) Police clear.	5.00	
e) Tax clear.	7.50	51.35
2. W. Pisuena (same as above)		51.35
3. Tony Toquero		27.50
For: Passport	$27.50	

Schedule "B"

Explanation, Item II:

Ball-cock-lacquer (handle only), 1 ea.	$ 1.25
Bushing, 1½x¾", 1 ea.	.40
Galvanized pipe, ¾", 24 ea.	10.50
Gate valve, ¾", 1 ea.	2.75
Gate valve, ½", 2 ea.	4.00
Bushing, ¾x½", 2 ea.	.40
Tie, ¾", 1 ea.	.40
Union, ¾", 1 ea.	.80
Union, ½", 1 ea.	.75
Nipples, ½ close, 1 ea.	.10
Tee, 2", 1 ea.	1.50
Tee, 17x¾x10", 1 ea.	1.05
Gate valve, ¾", 2 ea.	5.50
L. galv. pipe, ¾", 3 ea.	15.00
L. pipe, ¾", 1 ea.	5.25
Tee, ¾", 1 ea.	.76

Schedule "B"—(Continued)

Union, ¾", 2 ea.		1.50
Galv. pipe, ¾", ½ length		2.68
90° elbow, ¾", 3 ea.		.75
Tee, ¾", 1 ea.		.40
Gate valve, 1 ea.		2.75
Total amount	$	58.49
Less: Discounts		5.84
Balance of amount	$	52.65

Schedule "C"

Pipe straps, 100 ea.	$	10.00
Reducer, ¾" to ½", 9 ea.		3.15
Locknuts, ¾", 9 ea.		.36
Cond. pipe, ½", 30 ea.		12.00
12-3 Romex wire, 1 roll		55.00
Bushing, ½", 10 ea.		.60
Locknut, ½", 30 ea.		.90
Pipe straps, ½", 20 ea.		2.00
200 amps. fuse, 6 ea.		28.80
803 Romex wire, 25 ft.		14.00
Pressure connectors, 3 ea.		.45
Slimline, 1 ea.		39.50
Light, #410, 1 ea.		6.50
Total amount	$	173.26
Less: Discounts		45.57
Balance of amount	$	127.69

Schedule "D"

Crush corals, 1 load	$	9.00
Crush corals, 2 loads		18.00
Total amount	$	27.00

[Endorsed]: Filed November 4, 1954.

[Title of District Court and Cause.]

SPECIAL APPEARANCE AND
MOTION TO DISMISS

The defendant, American Pacific Dairy Products, Inc., specially appears and severing itself from the defendant, Joseph Siciliano, pursuant to Rule 8 (a), 9 (a) and 12 (b) of the Federal Rules of Civil Procedure, moves the court as follows:

I.

To dismiss the complaint in the above-entitled action because it appears on the face of the complaint that the court lacks jurisdiction and that the requisite jurisdictional averments are not contained within the complaint.

II.

To dismiss the complaint on the ground that defendant is a corporation, is not a citizen or resident of the unincorporated Territory of Guam in which this action is brought and is a citizen and resident of the State of Washington.

III.

To dismiss the complaint herein because the court is without jurisdiction and the defendant in this action is a citizen and resident of the State of Washington, and the provisions of Section 62 of the Code of Civil Procedure of Guam do not confer and cannot confer any jurisdiction on this court.

IV.

To dismiss the complaint because the plaintiff is not entitled to the relief herein prayed for in this

jurisdiction in that the complaint fails to show jurisdiction of this court over this defendant.

V.

To dismiss the complaint on the ground that the complaint fails to show the capacity of this defendant to be sued.

VI.

To dismiss the complaint herein filed in that it fails to state a claim upon which relief can be granted.

VII.

To dismiss the complaint filed herein on the ground that process and service is insufficient as required by the Federal Rules of Civil Procedure, Rule 4.

VIII.

To dismiss the complaint on the ground that Exhibit "A" attached to the complaint is a statement of account to another corporation and not this defendant.

IX.

This motion is based upon the pleadings and files in this case and upon the affidavits and exhibits herewith filed.

/s/ FINTON J. PHELAN, JR.,
Attorney for Defendant, American Pacific Dairy Products, Inc.

/s/ FINTON J. PHELAN, JR., for
LITTLE, LeSOURD, PALMER, SCOTT & SLEMMONS,
Attorneys for Defendant, American Pacific Dairy Products, Inc.

[Endorsed]: Filed November 26, 1954.

[Title of District Court and Cause.]

MOTION FOR CHANGE OF VENUE ON THE GROUND OF CONVENIENCE OF PARTIES AND WITNESSES IN THE INTEREST OF JUSTICE

In the alternative, and only in the event that defendant's motion to dismiss the complaint is denied, then the defendant moves the court as follows:

I.

To issue an order transferring the above-entitled cause to the United States District Court in and for the Northern Division of the Western District of the State of Washington at Seattle, Washington, on the ground that such transfer is for the convenience of the parties and witnesses as more clearly appears in the affidavits of Norman Thompson and Finton J. Phelan, Jr., hereto annexed as exhibits A and B.

Dated this 26th day of November, 1954, at Agana, Guam.

/s/ FINTON J. PHELAN, JR.,
Attorney for Defendant, American Pacific Dairy Products, Inc.

/s/ FINTON J. PHELAN, JR., for
LITTLE, LeSOURD, PALMER, SCOTT & SLEMMONS,
Attorneys for Defendant, American Pacific Dairy Products, Inc.

[Title of District Court and Cause.]

EXHIBIT B

Affidavit

Unincorporated Territory of Guam,
City of Agana—ss.

Norman Thompson, being first duly sworn, on oath, deposes and says:

1. That he is familiar with the defendant herein, American Pacific Dairy Products, Inc., and that of his own knowledge the said defendant corporation maintains its principal offices in the City of Seattle, State of Washington, at 1113 18th Avenue North.

2. That at said main offices all the books of account and corporate records are permanently maintained.

3. That all of the employees and agents of said defendant corporation having access and connection with the books, records and files of the defendant corporation reside in and work in the said City of Seattle, State of Washington. That the officers of the said corporation maintain their place of residence and business in the said City of Seattle, State of Washington.

4. That the directors of the said defendant corporation reside in and at the vicinity of said City of Seattle, State of Washington. That all meetings of the Board of Directors and all records of such meetings are held and maintained in the said principal offices of the said defendant corporation in the City of Seattle, State of Washington.

5. That all books of account and other business records of the said corporation are concentrated and maintained at the principal offices of the said corporation, which corporation operates under a centralized accounting and control system.

6. That of his own personal knowledge the vast majority of the witnesses and the records and other evidence which would be introduced in the defense of this action are situated in the said City of Seattle, State of Washington. That the cost of bringing witnesses to the unincorporated territory of Guam for the defense of this action would entail expenses of many thousands of dollars, would disrupt the operation of the business of the corporation and put a great burden on the corporation and cause heavy financial loss. That bringing the necessary records, files and documents to Guam would be oppressively expensive and cause defendant corporation great financial loss. That many witnesses would have to be brought to the unincorporated territory of Guam in the defense of this action and that adequate quarters and facilities for these witnesses are not available within the unincorporated territory of Guam.

7. That the cost of taking depositions of these numerous witnesses would be burdensome and needlessly expensive, and that to transfer this cause to the United States District Court in and for the Northern Division of the Western District of the City of Seattle, State of Washington, for trial and

disposition is in the interest of justice for the convenience of the parties and witnesses and will expedite the disposition of this matter, and in this connection affiant further says that the within action might have been brought in the latter forum in the first instance for greater convenience of all the parties and witnesses.

Further your deponent sayeth not.

[Seal] /s/ NORMAN THOMPSON.

Unincorporated Territory of Guam,
City of Agana—ss.

Norman Thompson, being duly sworn, says that he has read the above and foregoing instrument and the facts stated therein are true, except to those stated on information and belief and that he believes them to be true.

[Seal] /s/ NORMAN THOMPSON.

Subscribed and sworn to before me this 26th day of November, 1954.

[Seal] /s/ SYLVIA O. SHEPHERD,
Notary Public in and for the Unincorporated Territory of Guam.

My Commission expires November 6, 1955.

[Title of District Court and Cause.]

EXHIBIT A

Affidavit

Unincorporated Territory of Guam,
City of Agana—ss.

Finton J. Phelan, Jr., being first duly sworn, on oath, deposes and says:

1. Affiant is the attorney within the unincorporated territory of Guam for the defendant corporation in the above-entitled action.

2. That he has been informed by officers of the defendant and their counsel that the main office of the defendant is situated within the City of Seattle, State of Washington, at 1113 18th Avenue North.

3. That at said principal office of the defendant corporation all of their corporate records, papers and files are maintained and that likewise all the records and files of the Board of Directors of said corporation are maintained at the principal offices.

4. That the defendant corporation maintains a centralized system of control and all of its business records and management files are maintained at the principal offices of the defendant corporation in the City of Seattle, State of Washington.

5. That all of the principal officers, directors and executive employees of the defendant corporation reside in and around the City of Seattle, State of Washington.

6. That the officers, directors and executive employees of said defendant corporation are and will be necessary and important witnesses in the defense of this action.

7. That the defendant corporation will suffer great damage if put to the expense of transporting the officers, directors and other key employees of said corporation to Guam for the trial and defense of this action and that the corporation will be greatly and needlessly injured by the necessary and forced absence of its key officers at such a great distance from the principal office in the City of Seattle, State of Washington.

8. That within the unincorporated territory of Guam are not adequate facilities for the temporary housing of these officers and other witnesses.

9. That the defendant corporation will be heavily damaged and put to great expense by having large amounts of its corporate and business records absent from its principal offices and that this absence will cause great loss in the operation of the business of the defendant corporation.

10. That due to the large number of depositions of officers, directors, employees and accountants which would have to be taken, defendant corporation would be put to great and needless expense, inconvenience and will be hampered in the operation of its business.

11. That the forum of the Northern Division of the Western District at the City of Seattle, State

of Washington, is the most convenient one for the necessary and proper witnesses to attend and that a trial at that forum would incur the least cost and great saving of time for all concerned, and that for the convenience of the parties and witnesses and in the interest of justice to so transfer the case to the United States District Court in and for the Northern Division of the Western District at the City of Seattle, State of Washingon, for trial and disposition in which district the within action might have been brought in the first instance is to the convenience of the parties and witnesses and is in the interest of justice in this cause.

Further your deponent sayeth not.

[Seal] /s/ FINTON J. PHELAN, JR.,
Attorney for Defendant Corporation.

Unincorporated Territory of Guam,
City of Agana—ss.

Finton J. Phelan, Jr., being duly sworn, says that he has read the above and foregoing instrument and the facts stated therein are true, except to those stated on information and belief and that he believes them to be true.

[Seal] /s/ FINTON J. PHELAN, JR.,
Affiant.

Subscribed and sworn to before me this 26th day of November, 1954.

[Seal] /s/ SYLVIA O. SHEPHERD,
Notary Public in and for the Unincorporated Territory of Guam.

My Commission expires November 6, 1955.

[Endorsed]: Filed November 26, 1954.

[Title of District Court and Cause.]

MOTION FOR MORE DEFINITE STATEMENT AND MOTION TO STRIKE

Motion for More Definite Statement

In the alternative, and only in the event that defendant American Pacific Dairy Products, Inc.'s motion to dismiss the complaint is denied and the motion for change of venue should thereafter be denied, defendant, American Pacific Dairy Products, Inc., moves the court as follows:

I.

That the complaint is so vague and ambiguous that defendant should not reasonably be required to prepare a responsive pleading and defendant American Pacific Dairy Products, Inc., therefore moves that plaintiff be ordered to furnish a more definite statement of the nature of his claim, as set forth, in the following respects:

1. In paragraph III of the complaint, plaintiff should be required to indicate when and where the parties hereto became indebted to the plaintiff.

/s/ FINTON J. PHELAN, JR.,
Attorney for Defendant, American Pacific Dairy Products, Inc.,

/s/ FINTON J. PHELAN, JR., for
LITTLE, LeSOURD, PALMER, SCOTT & SLEMMONS,
Attorneys for Defendant, American Pacific Dairy Products, Inc.

Motion to Strike

In the alternative, and only in the event that defendant's motion to dismiss the complaint is denied, and thereafter the motion for change of venue and motion for more definite statement be denied, then defendant American Pacific Dairy Products, Inc., moves the court to strike paragraph III of the complaint on the ground that it is a conclusion of law and is contrary to Exhibit "A" thereto annexed.

To strike Exhibit "A" of the complaint on the ground that it is a statement of account to a corporation not a party to this action and on its face shows clearly that it is not a statement of account to the defendant or to the alleged partnership or partners.

/s/ FINTON J. PHELAN, JR.,
Attorney for Defendant, American Pacific Dairy Products, Inc.

/s/ FINTON J. PHELAN, JR., for

LITTLE, LeSOURD, PALMER, SCOTT & SLEMMONS,

Attorneys for Defendant, American Pacific Dairy Products, Inc.

[Endorsed]: Filed November 26, 1954.

[Title of District Court and Cause.]

ANSWER AND CROSS-COMPLAINT

The defendant, American Pacific Dairy Products, Inc., for answer to the Complaint herein, admits, denies and alleges as follows:

I.

The defendant is without information or knowledge sufficient to form a belief as to the allegations in paragraph I of plaintiff's complaint and, therefore, denies the same.

II.

The defendant denies the allegations contained in paragraph II of plaintiff's complaint.

III.

The defendant denies that it, or any purported partnership, doing business under the firm name and style of Dairy Queen of Guam owes the plaintiff the sum of ($13,870.48) Thirteen Thousand Eight Hundred Seventy and 48/100 Dollars, or any other sum.

Wherefore, having fully answered, the defendant prays that plaintiff's complaint be dismissed with prejudice and with costs taxed in favor of this defendant and against the plaintiff.

First Defense

The complaint fails to state a claim against the defendant upon which relief can be granted.

Second Defense

The court in this action lacks jurisdiction of the subject matter.

Third Defense

The venue of this action is improper.

Fourth Defense

That the amounts claimed by the plaintiff for subsistence, housing and transportation, for the Filipino contract laborers, if any were used, as set forth in Exhibit "A," would be illegal by virtue of the immigration laws of the United States as set forth in sections 1101 and 1184 of Title 8, U.S.C.A., and the Regulations of the Attorney General of the United States and Commissioner of Immigration of the United States implementing those sections, and defendant was relying on Joseph Siciliano to lawfully obtain labor for its operations.

Counterclaim

The defendant, American Pacific Dairy Products, Inc., for counterclaim against the plaintiff alleges as follows:

I.

That the plaintiff removed from the property of the Dairy Queen of Guam certain motors, condensers and equipment used in air conditioning said premises and the defendant hereby claims the sum of Four Hundred Fifty Dollars ($450.00) as damages resulting from the removal of said equipment and substitution of inferior equipment.

II.

That frozen strawberries and other supplies, including vanilla, were purchased in the name of this defendant and were diverted to the use of the plaintiff, all to the damage of the defendant in the sum of One Thousand Eighty Dollars ($1,080.00.)

III.

That certain materials and supplies were left from the construction of the building for the Dairy Queen of Guam and the plaintiff diverted these supplies to its own use and this defendant was damaged in the sum of Three Hundred Thirty-three and 99/100 Dollars ($333.99).

Wherefore, this defendant requests judgment against the plaintiff in the sum of One Thousand Eight Hundred Sixty-three and 99/100 Dollars ($1,863.99).

Cross-Complaint Against Joseph Siciliano

I.

That defendant, Joseph Siciliano, is the majority stockholder of the plaintiff, Pacific Enterprises,

Inc., is an officer and director thereof, and controls its actions.

II.

That defendant Joseph Siciliano conspired with the plaintiff Pacific Enterprises, Inc., to wrongfully and erroneously increase and expand the charges of Pacific Enterprises, Inc., to the purported partnership existing between the defendant Joseph Siciliano and the defendant American Pacific Dairy Products, Inc.

III.

That defendant Joseph Siciliano was in a position to injure the defendant American Pacific Dairy Products, Inc., in that the defendant Joseph Siciliano was supposedly acting as managing partner of the business on Guam under a de facto partnership agreement during the period in which his corporation, Pacific Enterprises, Inc., claims to have been furnishing the services and supplies set forth in Exhibit A attached to the complaint.

IV.

That in addition to erroneously increasing the amount due Pacific Enterprises, Inc., the defendant Joseph Siciliano diverted supplies paid for by the Dairy Queen of Guam to Pacific Enterprises and other enterprises owned or operated by the defendant Joseph Siciliano.

V.

That the defendant Joseph Siciliano maintained a grossly inadequate system of records for the Dairy Queen of Guam and did not report the expenditures

made by said Dairy Queen of Guam and thus is responsible for the lack of information and records in the hands of the defendant American Pacific Dairy Products regarding the debts owed by said Dairy Queen of Guam.

VI.

That as part of the scheme to mulct the defendant American Pacific Dairy Products, Inc., and for the purpose of concealing from said American Pacific Dairy Products, Inc., the diversion of funds, materials, supplies and overcharges to and by the plaintiff Pacific Enterprises, Inc., and other businesses of defendant Joseph Siciliano, the said defendant Joseph Siciliano caused to be installed and used a skimpy and inadequate system of bookkeeping at the Dairy Queen of Guam and caused to be misplaced, concealed and destroyed many of the supporting documents and basic records of the business. That without such records and documents the true liabilities and assets of the business were and are concealed.

VII.

That in keeping the books of the Dairy Queen of Guam the defendant Joseph Siciliano wrongfully and illegally utilized the services of one Diza, an employee of the plaintiff, Pacific Enterprises, and upon information and belief an officer of plaintiff, Pacific Enterprises, Inc., and a director of the same. Defendant Joseph Siciliano also used in the operating of the business of the Dairy Queen of Guam other employees of the plaintiff Pacific Enterprises, Inc., contrary to the provisions of Title 8 U.S.C.A.

Wherefore, defendant prays for judgment against Joseph Siciliano as follows:

1. That the defendant Joseph Siciliano account for all moneys received during the de facto partnership in the operation of Dairy Queen of Guam.

2. That the defendant Joseph Siciliano be required to pay to the plaintiff the sum of One Thousand Eight Hundred Sixty-three and 99/100 Dollars ($1,863.99) for damages caused by defendant Joseph Siciliano's inadequate management and conspiring to divert supplies and equipment from the Dairy Queen of Guam while under his management and control.

3. That the defendant Joseph Siciliano be required to account for the diversion of the air-conditioning equipment from the Dairy Queen of Guam.

4. That the court grant such other and further relief as the court may deem proper and lawful.

/s/ FINTON J. PHELAN, JR.,
Attorney for Defendant, American Pacific Dairy Products, Inc.

Duly verified.

[Endorsed]: Filed December 28, 1954.

[Title of District Court and Cause.]

REPLY TO THE COUNTERCLAIM

Comes now the plaintiff, Pacific Enterprises, Inc., a corporation, in the above-entitled action and replying to defendants' counterclaim, admits, denies and alleges as follows, to wit:

Reply to Counterclaim

I.

Replying to paragraphs I, II, and III contained in defendants' counterclaim, plaintiff denies each and every, all and singular the allegations contained in said paragraphs.

Wherefore, plaintiff prays that the defendants take nothing by virtue of said counterclaim and that judgment be rendered as prayed for in the complaint on file herein.

/s/ JOHN A. BOHN,

/s/ ROBERT E. DUFFY,
Attorneys for Plaintiff.

Receipt of Copy acknowledged.

[Endorsed]: Filed January 19, 1955.

[Title of District Court and Cause.]

ANSWER TO CROSS-CLAIM

Comes now Joseph Siciliano, an individual, and answering the cross-claim labelled, Counterclaim,

referred to as Cross-Complaint, of American Pacific Dairy Products, Inc., co-defendants in an action brought by Pacific Enterprises, Inc., a corporation, admits, denies and alleges as follows:

I.

Answering paragraph I of said cross-claim, admits that he is the majority stockholder and is an officer and director of Pacific Enterprises, Inc., and denies each and every, all and singular the other allegations contained in said paragraph I.

II.

Answering paragraphs II, III, IV, V, VI, and VII in said cross-claim contained, denies each and every, all and singular the allegations therein contained.

Wherefore, said Joseph Siciliano as an individual prays that the cross-claimants take nothing by said cross-claim, and that the cross-claim against him be dismissed with his costs of suit herein, and that he have such other and further relief as to the Court shall seem meet and proper.

/s/ JOHN A. BOHN,

/s/ ROBERT E. DUFFY,

Attorneys for Cross-Defendant Joseph Siciliano.

Receipt of Copy acknowledged.

[Endorsed]: Filed January 19, 1955.

[Title of District Court and Cause.]

PRETRIAL ORDER

JOHN A. BOHN, and
ROBERT E. DUFFY,
Attorneys for the Plaintiff.

FINTON J. PHELAN, JR.,
Attorney for Defendant, American Pacific Dairy Products, Inc.

January 26, 1955, at 9:30 A.M.

I. Pleadings:

The plaintiff filed this action against the defendants for the amount of $13,870.48, alleged to represent services and supplies by the plaintiff to the defendants in connection with the business and litigation in Civil Case No. 59-54, Joseph Siciliano vs. American Pacific Dairy Products, Inc.

The defendant, American Pacific Dairy Products, Inc., has filed an answer and cross-complaint which is in effect a denial of the principal amount claimed by the plaintiff and an allegation that the plaintiff owes the defendant $1,863.99.

II. Conference:

At the pretrial conference it developed that neither of the parties was sufficiently familiar with the circumstances surrounding the above claim to enable the court to prepare an intelligent pretrial order.

It was therefore agreed that the case should be set for trial and consolidated with Civil 59-54 in order to avoid duplication of testimony.

III. Order: It is herewith ordered:

1. The above-entitled action is set for trial February 14, A.D. 1955, at 9:30 a.m.

2. The action is consolidated for purposes of trial with Civil 59-54, Siciliano vs. American Pacific Dairy Products, Inc.

3. Any evidence produced in 59-54 which is material to the issue shall be considered as having been introduced in 68-54, the present action.

Dated and entered this 26th day of January, A.D. 1955.

/s/ PAUL D. SHRIVER,
Judge.

Approved:

/s/ JOHN A. BOHN,
Attorney for Plaintiff.

/s/ FINTON J. PHELAN, JR.,
Attorney for Defendants.

[Endorsed]: Filed January 26, 1955.

[Title of District Court and Cause.]

REQUEST FOR ADMISSION OF FACTS

To: John Bohn and Robert Duffy, Esquires, Attorneys for Plaintiff, Agana, Guam.

Please take notice that the defendant, American Pacific Dairy Products, Inc., hereby requests the plaintiff, Pacific Enterprises, Inc., pursuant to Rule 36 of the Federal Rules of Civil Procedure, to admit, within ten (10) days after service of this request, for the purpose of the above-entitled action only, and subject to all pertinent objections to admissibility which may be interposed at the trial, the truth of the following facts:

1. That no contract was ever executed by the Dairy Queen of Guam or on its behalf with Pacific Enterprises, Inc.

2. That Pacific Enterprises, Inc., was never authorized by the United States Immigration and Naturalization Service to contract out their alien contract employees to the Dairy Queen of Guam or to any other business.

3. That Joseph A. Siciliano is the sole owner of Pacific Enterprises, Inc.

4. That Henry Diza is not an officer of Pacific Enterprises, Inc.

5. That Henry Diza never was an officer of Pacific Enterprises, Inc.

6. That Henry Diza is an alien contract employee of Pacific Enterprises, Inc.

7. That except for qualifying shares of stock all stock in Pacific Enterprises, Inc., is held in the name of and for the benefit of Joseph A. Siciliano.

8. That employees of Pacific Enterprises, Inc., removed from the Dairy Queen of Guam 2500 pounds of frozen strawberries, 50 gallons of vanilla extract, sheets of plywood and other building materials, certain motors and condensers and other equipment from the air conditioning plant of the Dairy Queen of Guam.

9. That no merchandise of the Dairy Queen of Guam was segregated in the warehouse of Pacific Enterprises, Inc.

10. That Pacific Enterprises, Inc., never submitted a statement of account to the Dairy Queen of Guam until the year 1954.

11. That Pacific Enterprises, Inc., does not maintain separate books of account separate and distinct from the personal books of Joseph A. Siciliano.

12. That Pacific Enterprises, Inc., has in its possession certain books of account and supporting vouchers of the Dairy Queen of Guam for the period July, 1952, to April, 1953.

13. That Pacific Enterprises, Inc., did through its employees and alien contract employees operate the business of the Dairy Queen of Guam from the period July, 1952, until May, 1953.

14. That American Pacific Dairy Products, Inc.,

was not advised of such operation by Pacific Enterprises, Inc.

15. That during the period of operation by Pacific Enterprises, Inc., the funds of the Dairy Queen of Guam were commingled with funds of Pacific Enterprises, Inc.

16. That during the period June, 1952, to April, 1953, the agents and servants of Pacific Enterprises, Inc., working at Dairy Queen of Guam:

a. did not maintain daily, weekly or monthly inventories.

b. did not preserve the daily tapes from the cash register.

c. did not daily or weekly deposit funds of the Dairy Queen of Guam in the bank account.

d. frequently and as a regular course of business paid all bills of the Dairy Queen of Guam by cash payment.

Dated at Agana, Guam, this 2nd day of February, 1955.

/s/ FINTON J. PHELAN, JR.,
Attorney for Defendant, American Pacific Dairy Products, Inc.

/s/ FINTON J. PHELAN, JR., for
LITTLE, LeSOURD, PALMER, SCOTT & SLEMMONS,
Attorneys for Defendant, American Pacific Dairy Products, Inc.

Receipt of Copy acknowledged.

[Endorsed]: Filed February 2, 1955.

In the District Court of Guam,
Territory of Guam

Civil Action No. 59-54

JOSEPH A. SICILIANO,

Plaintiff,

vs.

AMERICAN PACIFIC DAIRY PRODUCTS, INC., a Corporation,

Defendant.

PACIFIC ENTERPRISES, INC.,

Plaintiff,

vs.

AMERICAN PACIFIC DAIRY PRODUCTS, INC., and JOSEPH SICILIANO, Co-Partners, Doing Business Under the Firm Name and Style of DAIRY QUEEN OF GUAM,

Defendants.

DEMAND FOR JURY TRIAL

The defendant, American Pacific Dairy Products, Inc., requests the Court to direct a jury trial of the issues raised by the complaint and the answer filed by this defendant and the issues raised by the counter-claim filed by this defendant, and a jury trial upon the issues raised by the cross-complaint against the co-defendant, Joseph Siciliano, filed by this defendant.

/s/ FINTON J. PHELAN, JR.,
Attorney for Defendant, American Pacific Dairy Products, Inc.,

/s/ FINTON J. PHELAN, JR., for
LITTLE, LeSOURD, PALMER,
SCOTT & SLEMMONS,
Attorney for Defendant, American Pacific Dairy Products, Inc.

[Endorsed]: Filed February 9, 1955.

[Title of District Court and Causes.]

Nos. 59-54 and 68-54

MOTION FOR SEVERANCE

The defendant, American Pacific Dairy Products, Inc., moves the Court as follows:

I.

That severance be ordered and separate trials be directed on the issues framed by the complaint and answer of this defendant and that the trial of the issues between the co-defendant, Joseph Siciliano, and the plaintiff be tried separately, and that the cross-complaint of this defendant against Joseph Siciliano be likewise separately tried, on the following grounds:

1. That the plaintiff in this action, Pacific Enterprises, Inc., Civil No. 68-54, is the alter ego of co-defendant, Joseph Siciliano, and is in fact indistinguishable from Joseph Siciliano.

2. That the attorneys representing plaintiff in this action, John Bohn and Robert E. Duffy, are

also the attorneys representing Joseph Siciliano, who is plaintiff in Civil No. 59-54, wherein this defendant is also a defendant, and that when this defendant filed a cross-complaint against Joseph Siciliano in this action wherein Joseph Siciliano, who is in fact also the plaintiff, was named as a co-defendant with this defendant, the said attorneys for the plaintiff, Pacific Enterprises, Inc., appeared for defendant and cross-defendant Joseph Siciliano, and filed his answer.

3. That the issues as drawn in the pleadings are such when considered with the fact that the attorneys for plaintiff, Pacific Enterprises, Inc., are also defending the co-defendant, Joseph A. Siciliano, and in effect Joseph Siciliano is both plaintiff and defendant, a fair trial of the issues in this action cannot be had.

This motion is based upon the pleadings and files in Civil No. 59-54 and Civil No. 68-54, and upon the affidavits this day filed.

/s/ FINTON J. PHELAN, JR.,
Attorney for Defendant, American Pacific Dairy Products, Inc.

/s/ FINTON J. PHELAN, JR., for
LITTLE, LeSOURD, PALMER,
SCOTT & SLEMMONS,
Attorneys for Defendant, American Pacific Dairy Products, Inc.

[Endorsed]: Filed February 9, 1955.

[Title of District Court and Cause.]

OBJECTIONS AND ANSWERS TO REQUESTS FOR ADMISSIONS

Plaintiff herewith presents proposed answers to some of defendant's requests for admissions and his objections to the remainder of said requests as follows, to wit:

I.

That all of defendant's requests for admissions are wholly improper and not timely in that on the 20th day of January, 1955, a pre-trial hearing was had on this case pursuant to an order of the District Court of Guam and that at that time the defendant was given an opportunity to request admissions of facts and of documents, but did fail absolutely and entirely to do so; that the scope of the issues in the case were set in the aforementioned pre-trial hearing, and to permit the requests of defendant for admissions at this time would serve to expand the pre-trial order, result in unnecessary delay, and violate the reasons and purposes for a pre-trial hearing.

II.

That the defendant has had ample opportunity to avail itself of the procedures provided for in Rule 36 of the Federal Rules of Civil Procedure pertaining to requests for admission, and has earlier neglected and refused to do so; that at this time, subsequent to the pre-trial hearing and pre-trial order of the District Court, shortly before the time

set for the trial of the action upon its merits the request of the defendant for admissions places an onerous and unfair burden upon the plaintiff.

III.

That all of the facts for which admissions are requested are controversial facts disputed by the plaintiff, and that the proper procedure to elicit such information is through discovery methods set forth in the Federal Rules of Civil Procedure and not by requests for admissions.

IV.

Plaintiff herein for further objection to the requests for admissions served by defendant, states that he is unable and unwilling to admit the truth of certain requested facts and for the reasons set forth below cited to each fact requested, objects as follows:

(1) That question No. 1 is uncertain and ambiguous in that it cannot be ascertained from the question whether or not defendant refers to a written, oral, express or implied contract.

(2) That question No. 2 is irrelevant, immaterial and outside of the issues of the case; that the issues as set forth in the pre-trial order of the Court are simple, and substantially as follows: (a) Whether or not plaintiff has delivered goods and performed services for defendant on an open account? (b) Whether defendant has accepted the goods and serv-

ices and does refuse to pay their value, wherefore the same ought to be paid? That said request for admission is not pertinent to these issues.

(3) In answer to question No. 3, plaintiff denies that Joseph A. Siciliano is the sole owner of Pacific Enterprises, Inc., but states that as of the dates material to this action he did own all of the shares of the corporation except a few qualifying shares, and further admits that for the purposes of this case only that he owned, controlled, dominated and was the alter ego of the corporation named in said question.

(4) That question No. 4 is irrelevant, immaterial and outside of the issues of the case; that the issues as set forth in the pre-trial order of the Court are simple, and substantially as follows: (a) Whether or not plaintiff has delivered goods and performed services for defendant on an open account? (b) Whether defendant has accepted the goods and services and does refuse to pay their value, wherefore same ought to be paid? That said request for admission is not pertinent to these issues.

(5) That Question No. 5 is irrelevant, immaterial and outside of the issues of the case; that the issues as set forth in the pre-trial order of the Court are simple, and substantially as follows: (a) Whether or not plaintiff has delivered goods and performed services for defendant on an open account? (b) Whether defendant has accepted the goods and services and does refuse to pay their value, wherefore

same ought to be paid? That said request for admission is not pertinent to these issues.

(6) That Question No. 6 is irrelevant, immaterial and outside of the issues of the case; that the issues as set forth in the pre-trial order of the Court are simple, and substantially as follows: (a) Whether or not plaintiff has delivered goods and performed services for defendant on an open account? (b) Whether defendant has accepted the goods and services and does refuse to pay their value, wherefore same ought to be paid? That said request for admission is not pertinent to these issues.

(7) Plaintiff admits that as of the dates material to this action, that except for a few qualifying shares of stock, all stock in Pacific Enterprises, Inc., was held in the name and for the benefit of the plaintiff.

(8) Plaintiff objects to Question No. 8 on the grounds that it is uncertain, ambiguous, misleading and does not subject itself to admission or denial; that the fact requested is a controversial fact disputed by the plaintiff and that the proper procedure to elicit such information is through discovery methods set forth in the Federal Rules of Civil Procedure and not by requests for admissions.

(9) That Question No. 9 is irrelevant, immaterial and outside of the issues of the case; that the issues as set forth in the pre-trial order of the court are simple, and substantially as follows: (a) Whether or not plaintiff has delivered goods and

performed services for defendant on an open account? (b) Whether defendant has accepted the goods and services and does refuse to pay their value, wherefore the same ought to be paid? That said request for admission is not pertinent to these issues.

(10) Plaintiff denies the question asked in Question No. 10.

(11) That Question No. 11 is irrelevant, immaterial and outside of the issues of the case; that the issues as set forth in the pre-trial order of the Court are simple, and substantially as follows: (a) Whether or not plaintiff has delivered goods and performed services for defendant on an open account? (b) Whether defendant has accepted the goods and services and does refuse to pay their value, wherefore the same ought to be paid? That said request for admission is not pertinent to these issues.

(12) That Question No. 12 is irrelevant, immaterial and outside of the issues of the case; that the issues as set forth in the pre-trial order of the Court are simple, and substantially as follows: (a) Whether or not plaintiff has delivered goods and performed services for defendant on an open account? (b) Whether defendant has accepted the goods and services and does refuse to pay their value, wherefore the same ought to be paid? That said request for admission is not pertinent to these issues.

(13) That Question No. 13 is irrelevant, immaterial and outside of the issues of the case; that the issues as set forth in the pre-trial order of the Court are simple, and substantially as follows: (a) Whether or not plaintiff has delivered goods and performed services for defendant on an open account? (b) Whether defendant has accepted the goods and services and does refuse to pay their value, wherefore the same ought to be paid? That said request for admission is not pertinent to these issues.

(14) That Question No. 14 is irrelevant, immaterial and outside of the issues of the case; that the issues as set forth in the pre-trial order of the Court are simple, and substantially as follows: (a) Whether or not plaintiff has delivered goods and performed services for defendant on an open account? (b) Whether defendant has accepted the goods and services and does refuse to pay their value, wherefore the same ought to be paid? That said request for admission is not pertinent to these issues.

(15) That Question No. 15 is irrelevant, immaterial and outside of the issues of the case; that the issues as set forth in the pre-trial order of the Court are simple, and substantially as follows: (a) Whether or not plaintiff has delivered goods and performed services for defendant on an open account? (b) Whether defendant has accepted the goods and services and does refuse to pay their

value, wherefore the same ought to be paid? That said request for admission is not pertinent to these issues.

(16) That Questions Nos. 16 a, 16 b, 16 c, and 16 d, are irrelevant, immaterial and outside of the issues of the case; that the issues as set forth in the pre-trial order of the Court are simple, and substantially as follows: (a) Whether or not plaintiff has delivered goods and performed services for defendant on an open account? (b) Whether defendant has accepted the goods and services and does refuse to pay their value, wherefore the same ought to be paid? That said requests for admission are not pertinent to these issues, and that questions Nos. 16 a, 16 b, 16 c, 16 d, are further improper in that they are ambiguous and misleading and are among the controversial facts in issue at the trial.

/s/ JOSEPH SICILIANO.

Subscribed and Sworn to before me this 9th day of February, 1955.

[Seal] /s/ E. L. CORFELL,
Notary Public in and for the
Territory of Guam.

My commission expires July 27, 1955.

[Endorsed]: Filed February 10, 1955.

In the District Court of Guam
In and for the Territory of Guam

Civil Action No. 68-54

PACIFIC ENTERPRISES, INC.,

Plaintiff,

vs.

AMERICAN PACIFIC DAIRY PRODUCTS, INC., and JOSEPH SICILIANO, Co-Partners Doing Business Under the Firm Name and Style of DAIRY QUEEN OF GUAM,

Defendants.

JUDGMENT

This cause came on regularly for trial before the Court sitting without a jury on the 18th day of February, 1955, Messrs. John A. Bohn and Robert E. Duffy appeared as attorneys for the Plaintiff, and Finton J. Phelan, Jr., Esq., appeared as attorney for the Defendant, American Pacific Dairy Products, Inc., and the Court having heard the testimony and examined the proofs offered by the respective parties, and being fully advised in the premises,

Now, therefore, by reason of the law and the facts aforesaid, it is

Ordered, Adjudged and Decreed:

1. That judgment be entered for the plaintiff and against the defendants in the amount of Six

Thousand Five Hundred Thirty-Four Dollars and Fifty-five Cents ($6,534.55).

2. That execution on the judgment be stayed for thirty (30) days from the 18th day of February, 1955.

Done in Open Court this 18th day of February, 1955, and presented for signature the 28th day of February, 1955.

/s/ PAUL D. SHRIVER,
Judge of the District Court.

May 6, 1955. Costs taxed in the sum of forty-six dollars ($46.00).

/s/ ROLAND A. GILLETTE,
Clerk.

[Endorsed]: Filed February 28, 1955.

[Title of District Court and Cause.]

Civil No. 68-54

NOTICE OF APPEAL

Notice is hereby given that American Pacific Dairy Products, Inc., a defendant above named, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit, from the final judgment entered on the 28th day of February, 1955.

Dated at Agana, Guam, this 17th day of March, 1955.

/s/ FINTON J. PHELAN, JR.,
Attorney for Defendant, American Pacific Dairy Products, Inc.

/s/ FINTON J. PHELAN, JR., for
LITTLE, LeSOURD, PALMER,
SCOTT & SLEMMONS,
Attorneys for Defendant, American Pacific Dairy Products, Inc.

[Endorsed]: Filed March 19, 1955.

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

We, the undersigned, jointly and severally acknowledge that we and our personal representatives are bound to pay to the plaintiff, the sum of two hundred fifty dollars ($250.00).

The condition of this bond is that, whereas the defendant, American Pacific Dairy Products, Inc., has appealed to the Court of Appeals for the Ninth Circuit by notice of appeal filed March 17, 1955, from the judgment of this court entered February 28, 1955, if the defendant shall pay all costs adjudged against him if the appeal is dismised or if the judgment is modified, then this bond is to be void, but if the defendant fails to perform this con-

dition, payment of the amount of this bond shall be due forthwith.

/s/ HELENA F. PHELAN,
Oka, Guam;

/s/ EDWARD THOMPSON,
Anigua, Guam.

Signed and acknowledged before me this 19th day of March, 1955.

[Seal] /s/ [Indistinguishable],
Notary Public in and for the Unincorporated Territory of Guam.

My commission expires December 13, 1956.

[Endorsed]: Filed March 19, 1955.

[Title of District Court and Cause.]

MOTION

The defendant, American Pacific Dairy Products, Inc., a corporation, moves the court to stay the enforcement in the judgment in this action pending the disposition of the defendant's appeal to the United States Court of Appeals for the Ninth Circuit, and for that purpose to fix the amount of the bond required to be filed by the defendant.

Dated at the City of Agana, unincorporated Territory of Guam, this 16th day of April, 1955.

/s/ FINTON J. PHELAN, JR.,
Attorney for Defendant,

By /s/ FINTON J. PHELAN, JR.,
LITTLE, LeSOURD, PALMER,
SCOTT & SLEMMONS,
Attorneys for Defendant.

Approved: Judge of the District Court of Guam. $7000.00.

See Supersedeas Bond for Approval.

/s/ R. A. G.

[Endorsed]: Filed April 16, 1955.

[Title of District Court and Cause.]

SUPERSEDEAS BOND

P. G. Bond No. 698

Know All Men by These Presents: That we, American Pacific Dairy Products, Inc., a Washington corporation, as principal, and Philippine Guaranty Co., Inc., Manila, Republic of the Philippines, by Pacific Insurance Associates, Ltd., General Agent for Guam, as surety, are held and firmly bound unto Pacific Enterprises, Inc., in the sum of $7000.00, to be paid to the said Pacific Enterprises, Inc., its attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 18th day of April, 1955.

Whereas, lately in a suit pending in the District Court of Guam in and for the unincorporated territory of Guam, between Pacific Enterprises, Inc., and American Pacific Dairy Products, Inc., a judgment was rendered against the defendant, American Pacific Dairy Products, Inc., and defendant Joseph Siciliano, and said American Pacific Dairy Products, Inc., having filed a notice of appeal dated the 19th day of March, 1955, to reverse the judgment, on appeal to the United States Court of Appeals for the Ninth Circuit.

Now the condition of this obligation is such, that if American Pacific Dairy Products, Inc., shall prosecute this appeal to effect, and satisfy the judgment in full, together with costs, interest and damages for delay, if the appeal is dismissed or if the judgment is affirmed, and satisfy any modification of the judgment and such costs, interest and damages as the appellate court may adjudge and award, then the above obligation to be void; else to remain in full force and effect.

/s/ EDWARD THOMPSON.

[Seal] AMERICAN PACIFIC DAIRY PRODUCTS, INC.,
Principal.

By /s/ EDWARD THOMPSON,
President.

Subscribed and sworn to before me this 18th day of April, 1955.

[Seal] /s/ [Indistinguishable],
Notary Public in and for the Unincorporated Territory of Guam.

My commission expires December 13, 1956.

[Seal] PHILIPPINE GUARANTY CO., INC.,

By /s/ W. E. FRITSCHE,

PACIFIC INSURANCE ASSOCIATES, LTD.,
Surety.

Unincorporated Territory of Guam,
City of Agana—ss.

On this 18th day of April, 1955, before me, the undersigned, a notary public in and for the unincorporated territory of Guam, personally appeared Philippine Guaranty Co., Inc., Manila, Republic of the Philippines, by W. E. Fritsche, General Manager, of Pacific Insurance Associates, General Agent for Guam, and duly acknowledged to me that as such General Manager, he executed the foregoing instrument as the free act and deed of the said Philippine Guaranty Co., Inc., for the consideration and purposes therein mentioned.

Witness my hand and notarial seal at Agana, unincorporated territory of Guam, the day and year in this certificate first above written.

[Seal] /s/ [Indistinguishable],
Notary Public in and for the Unincorporated Territory of Guam.

My commission expires December 13, 1956.

Form of bond and sufficiency of surety approved.

/s/ PAUL D. SHRIVER,
Judge of the District Court of Guam.

[Endorsed]: Filed April 19, 1955.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY

Defendant-Appellant herewith presents the statement of points upon which appellant intends to rely on appeal:

1. The court erred in entering judgment for the plaintiff against the defendant in that said judgment is contrary to the law, contrary to the evidence, and is not supported by the weight of competent evidence.

2. The court erred in permitting the attorneys for the plaintiff to represent the co-defendant, Joseph Siciliano.

3. The plaintiff lacked the capacity to maintain this action.

4. The court erred in not dismissing plaintiff's action in view of co-defendant Siciliano's admission that the plaintiff corporation was his alter ego and was owned and controlled by him.

5. The court erred in not dismissing the plaintiff's claim against the defendant in that it failed to state a claim upon which relief could be granted.

6. The court erred in denying defendant's motions for change of venue and to dismiss for lack of jurisdiction, and in denying defendant's demand for a jury trial.

7. The court erred in failing to file findings of fact and conclusions of law in this action.

/s/ FINTON J. PHELAN, JR.,
Attorney for Defendant, American Pacific Dairy Products, Inc.

/s/ FINTON J. PHELAN, JR., for
LITTLE, LeSOURD, PALMER, SCOTT & SLEMMONS,
Attorneys for Defendant, American Pacific Dairy Products, Inc., Seattle, Washington.

[Endorsed]: Filed June 20, 1955.

District Court of Guam,
Territory of Guam

Civil Case No. 68-54

Before: The Honorable Paul D. Shriver, Judge.

PACIFIC ENTERPRISES, INC.,

Plaintiff,

vs.

AMERICAN PACIFIC DAIRY PRODUCTS, INC., and JOSEPH SICILIANO, Co-Partners Doing Business Under the Firm Name and Style of DAIRY QUEEN OF GUAM,

Defendants.

TRANSCRIPT OF PROCEEDINGS

Appearances:

For the Plaintiff:
JOHN A. BOHN.

For the Defendant, American Pacific Dairy Products, Inc.:
FINTON J. PHELAN, JR.

February 17, 1955, 10:35 A.M.

The Court: The court will now take up Joseph A. Siciliano for Pacific Enterprises, Inc., plaintiff, vs. American Pacific Dairy Products, Inc., a corporation, No. 68-54, it being understood that neither party need repeat any evidence which was pre-

sented in Civil No. 59-54, in accordance with the pretrial order heretofore entered.

Mr. Bohn: May I proceed at this time, your Honor?

The Court: Yes.

Mr. Bohn: I ask permission to call Mr. Thompson as an adverse witness, if your Honor please, in this case. If the Court please, with the Court's permission, in the interest of saving time in this case, I would like to rapidly run over these items with Mr. Thompson as a witness to see which items are not in agreement or in substantial disagreement, reserving at this time in evidence those which may turn out not to be in disagreement.

MR. EDWARD THOMPSON

called as an adverse witness by the plaintiff, was duly sworn and testified as follows:

Direct Examination

By Mr. Bohn:

Q. You are the president of American Pacific Dairy Products, is that correct, Mr. Thompson?

A. Yes, sir.

Q. You have previously identified yourself in connection [2*] with the other case?

A. That is right.

Q. I take it you have in front of you a copy of the statement which was attached to the complaint in the present action? A. That is right, sir.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of Edward Thompson.)

Q. I am going to then go over rapidly with you, first of all, to find out those items that you, in your judgment, admit to be due.

Mr. Phelan: May I ask a question? Are you asking for facts? I would like to know as to whether he is asking Mr. Thompson for his opinion or for facts?

Mr. Bohn: My language was clumsy; I am asking for facts.

The Court: I think it is perfectly clear. He is asking Mr. Thompson, from his knowledge of the business, what amounts claimed by Pacific Enterprises, Inc., are properly chargeable to him.

Mr. Phelan: Well, you see, it is this—he might not know the exact amount.

The Court: Well, go ahead.

Q. (By Mr. Bohn): First of all, turn to page 1, August 1, 1953. You will see an item for subsistence? A. That is right.

Q. Now isn't it a fact that for the period set forth for those items those particular men were furnished subsistence by Pacific Enterprises? [3]

A. That is a fact, sir, and the days shown are correct. May I interrupt on this recap—there is a mistake of $10. It is carried forward as $2,031 and it should be $2,021. You can verify that that is a clerical error, you see. If you will add these on the next page under I, you will find they total $2,021.30.

Q. I am willing to accept your statement. You have added them and that is the correct total?

(Testimony of Edward Thompson.)

A. On the substatement that is also corrected; I have corrected that.

Q. The times are correct; the people are correct; the amount estimated for subsistence at $1.45 per man per day?

A. We are satisfied. I thought it reasonable and I thought it was fair, and I remember when I first got the bill I stated so.

Q. Is there any disagreement on housing facilities? A. None on housing facilities.

The Court: Now what items are those?

Mr. Bohn: Those are your subsistence items. I can give the court a total. Perhaps, Mr. Thompson —let's see—we have $975.85 plus $2,021.30, is that correct? A. That is right; roughly $3,000.

Q. I have a total—I haven't checked this schedule 11. Is Schedule 11 a subsistence item?

A. I call those II.

Q. $67.30—is that subsistence?

A. That is housing. [4]

Q. I see. All right, fine. My total, if your Honor please, to the material just testified is $2,997.15, is that correct? A. That is correct, yes.

Q. And as to that there is no dispute?

The Court: Now as I understand that takes care of subsistence and the defendant admits that they owe the subsistence?

Mr. Bohn: As to the housing, defendant also raises no objection to that.

Q. (By Mr. Bohn): We have one figure of

(Testimony of Edward Thompson.)

$398.00 plus $67.30, is that correct? A. Yes.

Q. Which is admittedly due?

A. Yes, we are not objecting to that.

Q. All right, now then let's turn to the next item—transportation. First of all I have already stated to the Court in informal fashion that I have been informed that that $600.00 item is erroneous, that you paid some or all of that yourself, is that correct? A. We will accept your statement.

Q. From your figures is anything owed for transportation?

A. No, sir; not a dime. There is no money owed for transportation.

The Court: They admit housing obligations in the amount of $465.30. That is total housing? [5]

A. That is right, sir.

Mr. Bohn: The total housing figure you just repeated is $465.30.

The Court: Now as to transportation?

Mr. Bohn: As to transportation we abandoned that request. That is item II or item III.

Q. (By Mr. Bohn): Now the next item, Mr. Thompson, is rent for reefer truck. No. 1, first I will ask you is it a fact that the reefer truck was used during this period?

A. I do not think so; it was not used as a storage for pints and quarts. We didn't need it; we object to that. You want to go into this at this time?

Q. I prefer to come back to it. Now the next item is No. V, for hauling supplies from the Com-

(Testimony of Edward Thompson.)

mercial Dock to the warehouse at $2.50 a ton. The total is $146.25.

A. I don't know enough at this time to say.

Q. Is the figure of $2.50 a ton a reasonable figure for that hauling?

A. I would think it would be, yes.

Q. That is reasonable enough? How about the number of pounds? A. I simply don't know.

Q. If I were to tell you that poundage was arrived at from various shipping documents, would that be satisfactory to you?

A. I think it would. I am not violently opposed to these [6] charges; I just don't know.

Q. Now as to the deliveries of supplies from the warehouse to Dairy Queen?

A. I take the same position.

Q. Now the next item, No. VII, is for storage of supplies. That, as you observe from the item, is computed at a figure of $35 per month. What is your reaction to that figure?

A. That figure is all right as a monthly rental. There is only one question: Siciliano did not store the supplies from June 22. At that time we had a warehouse free which Getz Brothers was giving us, which was inconvenient so Siciliano's organization moved the stuff down to their own.

Q. What date?

A. We were paying no rental bill so I have no dates to check.

Q. You agree that a rental of $35 a month is satisfactory but there is a question as to when it

(Testimony of Edward Thompson.)

started, is that right? A. That is right.

Q. Now the other item of storage—a freezing compartment at $7.50 a month, totaling $77.00?

A. That is so close that I wouldn't object to it. The only question there would be the time. I don't think we started on June 22 because we didn't have fresh strawberries then.

Q. You want the starting date?

A. That is all I want. [7]

Q. Would there be a variation of a week or so in the starting date?

A. I don't know when we got the strawberries.

Q. Can we glance now and see? It is a small amount.

A. Yes; if I could see the original journal I might have a pretty fair idea.

Mr. Bohn: May I have the exhibits, Mr. Clerk?

Mr. Phelan: I think it is the top one, Cris. Am I correct?

A. This is the one; I think I can find it. No, we bought some frozen strawberries but it is not carried here. I thought there would be some indication but there isn't.

Q. In the interest of speed would it be satisfactory if we put down July 1 as the beginning date instead of June 22?

A. I don't think it makes much difference.

Q. So it would be $75.00?

A. I am not trying to chisel on nickels or dimes.

Q. Yes; we are trying to reach substantial agree-

(Testimony of Edward Thompson.)

ment. Now the maintenance figures. You agree there are four of them; one, electrician?

A. I haven't any information at all, and I can't imagine he did put in that much time.

Q. That is a figure you dispute?

A. I dispute that and the reefer mechanic and garbage. I know they didn't haul it every day.

Q. The first three items require testimony and the last [8] item I am willing to reduce that item by one-half. I am informed they did not haul every day. They hauled every other day and a reasonable fee was $1.00 per hauling enterprise. Is half that figure satisfactory to you?

A. We don't haul that often but we will accept that. We haul about every five days because we have no such thing as garbage. All we have is residue.

Q. So the figure would be $126.50?

The Court: Whereabouts do you find that?

A. Schedule IX, maintenance.

Mr. Bohn: Item No. 4, Schedule IX.

The Court: What else?

Mr. Bohn: The others are in controversy.

The Court: The others are denied and you admit refuse collection?

Mr. Bohn: At a total amount of $126.50, to which the plaintiff reduced his demand.

Q. (By Mr. Bohn): Now next is a list of supplies——

A. I can see no need for any plywood, for instance. I don't know what we need with them, and

(Testimony of Edward Thompson.)

200 pounds of granulated sugar—we might have used some to make simple syrup; in fact I am sure we did, but I don't think we used anything like 200 pounds. What is known as imitation vanilla couldn't be used in ice cream.

Q. You question imitation vanilla? Do you question the [9] grounded nuts for $3.00?

A. No; those could have been.

Q. You question imitation vanilla. How about the mulch paper?

A. I can't imagine what that was used for. Plywood—when I left we had some plywood left over so I can see no need for additional plywood, especially the quarter-inch plywood. That would be for inside trim.

Q. How about the sugar——

A. The sugar is too high; I am sure. Oh, sugar scoops—that is probably all right. We could have used those and DDT and Dutch Cleanser—those are things we use ordinarily and we could have bought them from Pacific Enterprises just as well as J & G or anyone else. Simple syrup is to cut toppings and our toppings were shipped over ready to use and required no cutting.

Mr. Bohn: We will have some testimony as to what it was used for later.

A. Clorox—I will pass that.

Q. (By Mr. Bohn): Lily cups?

A. That is only 200. I am going to pass that although we don't use that size Lily cup.

Q. For your own information I questioned that

(Testimony of Edward Thompson.)

item by a question by counsel in some of the interrogatories. I was informed that there was a time you ran out of a particular cup and this was some kind of emergency situation. [10]

A. Not for $2.20.

Q. How about the straws?

A. I would like to know about straws. I left 50,000 straws when I left in June. They should have lasted six months.

Q. As to those items the only ones that are admitted are $3.00, $3.00, $1.96, $3.50, $11.47, $2.00 and $2.23?

A. Yes; I don't know whether they were used or not but I will assume they were.

Q. Now, on the next item, the two loads of crushed coral, lacquer paint and a couple of bulbs?

A. That crushed coral I don't know anything about. We paid Overseas Construction $1,100 and some odd dollars extra for filling in and leveling the front lot. I can't see why we needed more coral after that was done.

The Court: Where is your item for coral?

A. Item No. XI, your Honor.

The Court: Yes; one item in XI. I first have the paint.

Q. (By Mr. Bohn): Yes; what about the paint?

A. I don't know anything about it. I don't know what it was used for. If I knew what they were used for I could pass upon them.

Q. I was told—it was stated to me that as a result of an inspection there was a request that some

(Testimony of Edward Thompson.)

sections be painted over on the inside and that was what this was used for. However, we can put on testimony. Now on item XII—— [11]

The Court: I am not clear on XI yet.

Mr. Bohn: He requests testimony on all portions of item XI.

The Court: Very well.

Q. (By Mr. Bohn): Now, first of all, I will ask you if you have at the Dairy Queen a ¾ h.p. motor, Westinghouse? A. No, sir; we do not.

Q. It is not there?

A. No, sir; we have looked for that and we have no means of knowing what it was used for, either.

Q. How about the hot fudge heater?

A. I don't know whether it is there. When I opened up here on June 22 I didn't think the people on Guam would want hot fudge sundaes, but Henry sent me an order to ship over some hot fudge. I knew we didn't have a hot fudge heater so I ordered a heater for it also. We paid $19 for it. We bought the hot fudge heater that is there.

Q. The one you have is the one you bought yourself? A. That is right.

Q. How about these two Universal condensers?

A. And the blower and air cooler evaporator—those three I think we can handle in one thing and the bottom item, too. Before we opened we had the front room, the sales room, air conditioned by a man named Griffith Thomas who is in that business on the island of Guam. I forget what his charge was. It was over [12] $1,000 and he put all this in. Later

(Testimony of Edward Thompson.)

on I am told that some of Pacific Enterprises men came in and took out some of these units and substituted these two electric fans you see down there. When Norman came over here later on they put back these units for which we were charged. In other words, these units for which we were charged were simply taken out—and for which we paid. When Norman came over here he spent some $250 or $300 getting the air conditioning to work, and we still have the fans. They are in the warehouse.

Q. Are you willing to return the fans at this time?

A. Yes; we are willing to return the fans.

Q. Now the rest—it is apparent from your discussion that we require testimony on that. How about the deep freeze?

A. The deep freeze—when I came over, you see, the store had been running for six months when I came over at the end of December, and here is a letter that I have written to Joe Siciliano at Las Vegas. It is dated January 1st. This was a friendly letter to a friend, a business associate.

Q. What is the date of the letter?

A. January 1, 1953. "Joe Meggo and Tony both told me when I saw them last Sunday that we needed two more freezers and another deep freeze for the quarts and pints" and both believed we did. Yet I have never seen that cabinet as much as half full although every night I told Tony to fill the cabinet before he closed for the night. You see, I know quite a bit about this [13] business and out

(Testimony of Edward Thompson.)

of the 2,500 in the United States not more than 25 have more than one cabinet. Later when Norman came over he found this cabinet there. I told him to get rid of it. It was a beat-up cabinet. Joe had it, probably as a hangover from his Harmon Field operation. I told him to get rid of it.

Q. How long ago?

A. When he came in May but that deep freeze was in the place when I came in January or December, 1952. In other words, we operated very successfully with one deep freeze and then it was only half full. That deep freeze will handle more quarts and pints than we sell in a day and in those days we were only handling two flavors.

The Court: What is the date of your letter?

A. January 1, 1953, and it was just a friendly business letter to an associate.

The Court: And so you question all of those items?

A. All of them, yes, sir.

Q. (By Mr. Bohn): The next item on the agenda, item No. XIII. $90.97 for G. C. Balmonte, I am informed, was relief. Balmonte went down there for a couple of weeks when one of the other men was sick. A. I believe it.

Q. I think we even have the name of the man who was ill. A. Yes.

Q. A man could be sick. Now there is the item for [14] bookkeeping from 22 June to March, '53?

A. We wouldn't concede that.

Q. You will not? A. No, sir.

(Testimony of Edward Thompson.)

Q. You will concede that he kept the books? You don't concede that is a fair amount?

A. He did do some work there, yes.

Q. Are you willing to concede his services worth anything for which you are willing to pay?

A. I will pass that for the moment. The same goes for Viet and Meggo. I want to pass those.

Q. And the next item is the item on the construction of the building. As I understand you have an item showing the total amount demanded?

A. Yes. The total amount?

Q. Yes. A. The suit is for $13,870.

Q. I mean the total amount for building. You and I have been talking in previous questions about $4,000. My figures which I quickly totaled yesterday show that we are demanding $3,000.

A. Yes; when you said $4,000, it sounded high.

Q. It is $3,619.96? A. Yes, sir.

Q. No. 1, you concede that the structure was [15] built? A. I found out that it was, yes.

Q. It is being used at the present time by your son as both an office and living quarters?

A. Yes, but we don't need it for that. It was an eyesore for many months and finally he asked if he could close it in in front, put plywood and paint it and make it match the rest of the store if we could use it, and I said, "If you want to take the same chance that Mr. Siciliano did, go ahead but we don't owe a dime on that."

Q. You claim it was unreasonable and undesirable and therefore you don't owe anything? Are the

(Testimony of Edward Thompson.)

charges set forth reasonable for a building of that type? A. No, sir.

Q. Do you question all of them?

A. I can't question all of them. I don't know how many days these men worked. I haven't the slightest idea about that. Here are some items I can question—that quarter-inch plywood, $6.50 for a sheet, 4 x 8. I was buying plywood for less than $4.00 in Guam. That would be for marine plywood brand new. This is not water-proofed plywood and it has been used. You can see where the nail holes are. Sometimes around in the corners it is broken a little, but it is perfectly good if you want to put up a building, but I don't believe anyone should pay figures like that for surplus plywood.

Q. What is the square footage of the building? You gave [16] us the dimensions.

A. I would say about 500 square feet.

Q. About 500 square feet?

A. Roughly, yes.

Q. And you question that $3,300 as a reasonable figure for a building 500 square feet?

A. If I wanted a building of 500 square feet—if I wanted a building I might pay $3,300 out on bids, but I wouldn't have surplus refrigerator panels used for panelling and I wouldn't pay $50 apiece for panels. I think the price is around $10 because George O'Keefe told me Joe Siciliano had a chance——

Q. Well, I don't know whether we should put this in the record.

(Testimony of Edward Thompson.)

A. But we wouldn't have put the panels in.

Q. That is your basic objection?

A. Yes, it is. We didn't order the building. We don't want the building. We didn't know the building was being put in, and I am firmly convinced that the building was constructed to be used as a snack bar for Pacific Enterprises and to be run by Pacific Enterprises.

Q. You believe that?

A. I am reasonably sure, yes.

Q. This figure you are talking about is about $6.00 per square foot for this building? $3,300 for 500 square feet? A. $7.00 a square foot. [17]

Q. I don't find $7.00 here.

A. Well, six times five would be 30; it is closer to seven than it is to six.

Q. Actually it is about six and a half?

The Court: $6.60, I believe.

A. My objection isn't specifically as to the cost but as to the value to us. We didn't want it. We would have been opposed to it.

Q. Now, when were you first advised, Mr. Thompson, that this building was going to be constructed or had been constructed?

A. Well, the first word I got was on August the 1st and I didn't know what that was for. I heard definitely on August 2nd that they had constructed a building.

Q. August 2 of '52?

A. Of '52, yes, and I immediately protested. When I first wrote Joe——

(Testimony of Edward Thompson.)

Q. I would like to know what you said when you found out about it?

A. Here it is. On August 1st—at that time—well, let me read it.

The Court: Is this August, 1952?

A. August 1, '52. It is written to Mr. Joseph Siciliano and at that time I didn't know he hadn't gone back to Guam—"Although I have reason to believe you are still Stateside I have to send this to Guam because I do not know where you can be [18] reached Stateside." This is my opening paragraph. "This morning I received a wire from W. B. Fuller Company asking me to send details about the glass you ordered. I had to write them I had not heard from you. I asked them to hold this up until I could hear from you. Maybe you want to have some glass there in case of accident to the present store. I would like to know something about it. Two days after the store was opened when I left there was a great deal of turmoil"—and then I go into some other things, but that shows——

The Court: Did you ever get a reply to that, Mr. Thompson?

A. No, sir. He called me on August 9 long distance but I think he called me in reference to this second letter that I sent August 2 but continued to address to Post Office Box, Agana. I said, "Bad news travels fast and I heard two things which upset me. No. 1, that I would not recognize the store." That was a bit of sarcasm. "I do not like to get such news second or thirdhand, especially

(Testimony of Edward Thompson.)

this, and for two reasons. The first is you did not mention it to me and I think I should have been consulted. Second, there are between 2,500 or 3,000 Dairy Queen stores in the States and all of them follow the same basic plan of the Thompson's Freeze Company I am interested in in the States and we have 17 of them and we still make no changes and all of them think the stores as built are adequate and since none of you here know how a store should be built, it would have been wiser to make sure you were right," and that is all I said [19] with reference to that, but that is the first time I knew there was an addition.

The Court: That was about August 9?

A. August 2, 1953, and Joe called me up and said——

Mr. Bohn: I shall go on with that.

The Court: Yes.

A. "You seem to be all upset about this thing. You were probably nervous when I talked to you," and he said, "I talked to you about that store," and I denied it and later, on the 11th, I wrote him referring to his phone conversation, "I have been checking over my memorandum and I am sure we did not discuss anything about a snack bar attached to the Dairy Queen store." He told me I was probably nervous and excited and forgot all about it. I told him, "Joe, I am too much of a business man. I do get nervous and I do get excited, but never enough to forget business commitments," and it was discussed but not settled and in this particular

(Testimony of Edward Thompson.)

case there was no reason to get excited or nervous. I was opening the Dairy Queen store and for the past four or five years I know how I think and how I operate. I would have suggested that we at least wait awhile and see what the store would do. I cannot escape the fact that I would not have agreed to change the appearance of the store and any addition is sure to fail to help its appearance. In our phone conversation he said the snack bar was open and operating, so I said, "It is OK." I assumed that the snack bar on the partnership [20] lot belonged to the partnership. In other words, your Honor, I said OK, assuming the thing is open and operating. It is an accomplished fact you just have to take. There is nothing to do about it. That is not an approval of anything.

Q. You testified it wasn't approved later because you didn't approve the glass?

A. Well, that testimony came just this day but Joe's conversation was on August 9, 1952.

Q. Perhaps it is speculative—let me ask you this question: Isn't it a fact that during this period of time Mr. Lyle Turner was acting as Mr. Joseph Siciliano's attorney in fact?

A. I think so. I might have known it at the time but I have forgotten it now.

Q. It is certainly true, is it not, that you and Mr. Turner corresponded frequently in regard to Mr. Turner's activity on behalf of Mr. Siciliano?

A. Frequently is not the term but we did correspond, yes.

(Testimony of Edward Thompson.)

Q. Isn't it true that Mr. Turner wrote to you about October 30, 1952? I will read the language I think he wrote: "I have asked Henry for the figure on the cost of the addition to the Dairy Queen building since he advised me yesterday this has been dispersed from Pacific Enterprises funds. It is my desire to have that disbursement reimbursed at the first opportunity in view of the pending litigation in Guam." Did you [21] ever answer that letter?

A. Yes, sir; I did. His letter of October 30, which I mentioned, was in answer to mine of October 9 in which I mentioned that I discussed certain things with my associates and said none of us were pleased with the addition Joe has built to the store. "With different associates in some instances, I and these associates control some 23 Dairy Queen stores in Washington, 2 in Alaska, and 53 in Pennsylvania. In every instance we insist that only Dairy Queen products be sold on the premises. We do that because we have learned that every Dairy Queen store that tries to serve sandwiches or light lunches winds up broke. However, in this case we did not know how far Joe had gone with the construction of the addition to the store. As much as we dislike it, we dislike even more the idea of making Joe lose the cost of construction if such cost is more than a nominal amount. So, we three decided to let this matter rest until I get back to Guam, when Joe returns, and Joe and I get together and settle this matter." That was my letter of October 9.

Q. Didn't that letter say that even though you

(Testimony of Edward Thompson.)

disliked it, in the interests of harmony you would go on with it?

A. Not as I read this completely.

Q. Isn't it a fact you said to Mr. Turner in substance, "My associates and I don't like it but in the interest of harmony we will make an adjustment on this matter"?

A. No, it wasn't. I said something like that. You see, [22] all this time I was under the impression that the snack bar was open and operating. All I knew was what Joe told me over the phone so on November 1, with reference to a paragraph in a letter—I am referring to Mr. Lyle Turner's—"We all felt that Joe had acted hastily in building a new addition," etc. "It should be decided by both partners. With reference to the addition being built on the present Dairy Queen, we know so little of its purpose, its cost, whether the construction had been completed or in process and so on that we decided that we would let the whole matter ride until Joe and I could get together and look at the matter from all angles, especially if Joe had already spent considerable money on the addition." In other words, we were prepared to swallow our dislike in the interest of harmony. None of this do I construe as being in favor of the store. I am saying I don't want it and we never wanted it. We didn't like it on November 1. I still did not know of its purpose, its cost, whether construction had been completed and so on, but I said, "I am trying to keep the thing going."

(Testimony of Edward Thompson.)

Q. We have your view pretty well before us.

The Court: Did anyone ever write you that Mr. Siciliano, Mr. Turner or anyone else had protested at that time about the store?

A. That has never been done.

The Court: In other words, nobody ever wrote you and questioned the accuracy of the advice you gave Mr. Turner? [23]

A. Nobody ever did and I might add, your Honor, this store was started a very few days after I left Guam in June, 1952.

Q. (By Mr. Bohn): Isn't it a fact that Joe questioned it?

A. I don't think he questioned it. I think he was covering up. He said I was excited and nervous and didn't remember discussing it.

The Court: I want to ask this question: Based upon your experience in the operation of ice cream dispensaries, as a general practice, does not the ice cream dispensary attract a different type of trade from what you would call a snack bar trade?

A. What we call a hamburger business—we think it does.

The Court: Doesn't the ice cream business attract a gentile clientele?

A. We believe so but we may be prejudiced.

The Court: In other words, the drunk doesn't come in?

A. He goes to a beer joint.

The Court: Or for coffee and a hamburger.

Q. (By Mr. Bohn): Now, it is true, is it not,

(Testimony of Edward Thompson.)

that since September or October, 1953, Mr. Norman Thompson has been using this addition as a residence or office? A. That is correct.

Q. He is using it?

A. Oh, yes; he is using it as of today or American Pacific Dairy Products is using it for [24] Norman.

Q. Are you staying there?

A. I am staying there, too.

Q. So there is value in that building? Isn't it a fact if he wasn't there he would have to live somewhere else? A. That is up to him.

Q. How about the office?

A. It is no trick at all. He has a typewriter and a desk.

Q. It is a fact, is it not, that whatever office Dairy Queen has on Guam is in that addition?

A. Oh, that is right, yes.

Q. And it is a fact that whatever living quarters you have on Guam for the manager of Dairy Queen are in this addition, is that correct?

A. That is correct, but we don't have to furnish him living quarters, but it is a fact it is being done. He is sleeping there, yes.

Mr. Bohn: I have no other questions.

Mr. Phelan: I have some questions.

Cross-Examination

By Mr. Phelan:

Q. First of all, in 1952, who was the attorney for American Pacific Dairy Products?

(Testimony of Edward Thompson.)

Mr. Bohn: I didn't hear that question.

Q. (By Mr. Phelan): I asked who in 1952 was the attorney for American Pacific Dairy [25] Products? A. Lyle Turner.

Q. The answer was Lyle Turner. You did not have any contractual obligations or otherwise to furnish your manager quarters?

A. No, sir; we do not, and before he moved in there he paid his own room rent.

Q. When he fixed that up were any funds of Dairy Queen used to fix that up?

A. No, sir; he bought his own plywood and his own paint, and I think he painted it himself. I don't know.

Q. What value is that to Dairy Queen?

A. The question now, if it has any value, in my opinion, the question is, would we take it at any figure and assume the additional liability. We have to pay Mr. Siciliano quite a bit of money. You might have a pair of shoes and you say, "You have to take them; they are valuable to you," but if I can't afford to buy shoes I don't think I should be forced to buy the shoes. It is as plain to me as that, at least.

Mr. Phelan: I have no further questions.

Redirect Examination

By Mr. Bohn:

Q. The same Lyle Turner as I mentioned awhile ago as attorney in fact for Mr. Siciliano was your attorney? A. Yes.

(Testimony of Edward Thompson.)

Q. Did you know also that Mr. Lyle Turner was secretary-treasurer [26] of Pacific Enterprises?

A. I did not know that until he wrote about the laborers and then he signed as secretary-treasurer. Most of his letters were just signed, "Lyle H. Turner."

Mr. Bohn: I have no further questions. Now, if your Honor please, the next witness is the construction foreman on this building and he will—his testimony will simply be that the building was built, that the men were there during the various periods. I don't know how much you want us to go into these details on the matter.

The Court: Well, first, your proof doesn't necessarily have to follow in an exact pattern, but unless you can convince me that the corporation agreed to the construction of this building for the operation of a snack bar, I don't think that this building is a proper charge. The fact that, of necessity, it had to be converted—I think it is worth something and I think you are entitled to some allowance for it but not in terms of total cost. It just absolutely strikes me as being ordinarily beyond imagination that a firm that was attempting to set up an ice cream dispensary here would attempt to operate a snack bar in connection with it because we know Guam and we know that a snack bar does tend to attract the rowdy and dissolute and noisy and obscene, contrary to the normal patronage of an ice cream place, so you have got to show me first before I am interested in your construction cost—you

have got to show me that this [27] corporation ever consented to it.

Mr. Bohn: Well, I will put on Mr. Siciliano and your Honor can judge the testimony for yourself.

The Court: Yes.

MR. JOSEPH A. SICILIANO

called as a witness by the plaintiff, was duly sworn and testified as follows:

Direct Examination

By Mr. Bohn:

Q. Now, Mr. Siciliano, you have been present during some of this testimony so I won't go back over it. The next line of questions is going to be directed toward the building of an addition on the original Dairy Queen store. I will first ask you if you are the one who instructed or directed that that addition be built? A. I did.

Q. And did you discuss the matter with Mr. Thompson before he left Guam in June of '52?

A. I certainly did.

Q. And what was that discussion?

A. Well, first of all, the location. We talked about it before the Dairy Queen was opened when we were negotiating the partnership. It was in a position that is quite alone and I talked about putting an addition in. It wasn't going to be what you call a snack bar—not a place where you sit down. It [28] was going to be the same idea—windows like the Dairy Queen—and service would be from an open window. All we were going to serve was

(Testimony of Joseph A. Siciliano.)

root beer and hot dogs and so forth in order to keep a crowd in that section, and I discussed it with Mr. Thompson and he said he thought it would be all right. I even asked him where he got the glass for Dairy Queen so I could make it look like the Dairy Queen, as much like it as anything, so the men back home wouldn't feel like we went and done something on the side. This was discussed in a conference when I talked to him before he ever wrote that letter.

Q. Fix the time. It took place about when?

A. I talked to him about July 2. I gave the order and I ordered the glass from the Fuller Company because that was the address he gave me. He gave me the address after I talked to him and I discussed it with him over the phone. I said, "How could you forget? You must have been nervous." I also told him I didn't want to make any difference in the appearance—the edging of the glass should be exactly alike. In fact, we made the front to fit that way. On the phone that day there was a long conversation. He said his board of governors didn't like the idea and that affected his attitude. I could tell. But I said we had already gone ahead and we had a lot of conversation. It was pretty hard to stop but if he wanted to stop I would. I told him he had said, "Go ahead," just before he left because I talked to him just before he left on the plane. I wouldn't go [29] ahead and build a building without letting him know. It doesn't make sense, being

(Testimony of Joseph A. Siciliano.)

a business man. The only one who knew was my foreman because he was in the discussion of how we were going to place the glass. That was before Mr. Thompson left. We even paced it off. We talked about it with the foreman at that time. He is not with me anymore, but he was the one I gave full instructions to, how to conduct this thing while I was gone—to continue this building. He has done all my building before and when I left in this case I knew it would be done right. This was not going to be a place for drunks to come in like the judge said. It was where school boys could come in, buy stuff and put their trash in a trash can and that was the kind of setup. We didn't want to spoil that setup. I realized, as a business man, you didn't want a sit-down place attached to the Dairy Queen. I can show you a brand new popcorn machine and root beer keg that dated back to Harmon Field. That was something I was going to use but it turned out to be a paper operation. This was going to be for sandwiches, root beer, stuff like that, and it was a stand-up deal just like Dairy Queen—no difference—more or less like what they call a milk bar or stand because we discussed that with Mr. Thompson. It was going to be more like a milk bar. That is exactly what we were doing because at that time there was no milk on the island. International Dairy hadn't come in. It was going to be like a milk bar, a dairy bar, that was the idea of the setup because on my own I would never go [30] ahead without letting him know something. That is

(Testimony of Joseph A. Siciliano.)

what I told him over the phone but being as his board of directors didn't like it, he changed his mind. I wouldn't go on without his knowledge. I said, "Because they didn't like it now you are taking a different stand." That was my conversation.

Mr. Bohn: I have no further questions.

Cross-Examination

By Mr. Phelan:

Q. When was the first time you discussed this addition with Mr. Thompson?

A. Before the store ever opened.

Q. When was that?

A. June 18, June 17, June 19—I don't know exactly.

Q. That was before you entered into this agreement? A. Yes, sir.

Q. Did you discuss that in the agreement?

A. No; not whatsoever.

Q. All right, how many times did you discuss it with Mr. Thompson?

A. Oh, I have no recollection how many times before but I think right up to the day he left. We talked about it after the agreement was signed.

Q. You think?

A. No, I don't think; I know. Up to the time he took the plane. [31]

Q. Where did you talk about it?

A. In front of the Dairy Queen store, my restaurant, a number of places. I couldn't tell you all

(Testimony of Joseph A. Siciliano.)

the different places—wherever we would be—in the car.

Q. When did you discuss it at your restaurant?

A. Maybe when we had dinner.

Q. When? A. It could have been June 22.

Q. Did you discuss it after that?

A. To the day he took the plane.

Q. How many times did you discuss it in your restaurant?

A. Oh, I'd say I discussed it in front of Madeline one or two times. Madeline was in on almost all of the conversations—Madeline Dorsit—two or three times—whenever he had dinner there—quite frequently.

Q. During the period from 22 June until he left?

A. Well, it might have been before then, too. It was before and after.

Q. But you had a contract with American Pacific Dairy Products from the 23rd of June, didn't you?

A. I don't remember the exact date; I think so.

Q. When did you call him in the States?

A. I think around July 2nd.

Q. Did you tell him about this addition then?

A. Yes. [32]

Q. When was the addition started?

A. It was started about two days before I left or even before. I imagine it started—I had my boys up there right about the time Mr. Thompson left.

Q. Right after Mr. Thompson left?

(Testimony of Joseph A. Siciliano.)

A. It must have been started around that time because I wanted to get into it right away.

Q. Did you ever write him about this in any of your letters? A. No; I have not.

Q. Did you answer any of his letters about this?

A. No; on answering any letters, the letters were sent to either Mr. Turner or Madeline Dorsit and she answered whatever letters were necessary at the time because, as I told Mr. Thompson at the time, I am a very poor correspondent. I would rather spend $40 on a phone call than write letters. I have been that way all my life.

Q. Did you order glass? A. I did.

Q. At this time were you not constructing a new snack bar in Tamuning?

A. No; it was already up.

Q. The present snack bar in Tamuning?

A. It was up and operating.

Q. Didn't you at this time build a new one next to it [33] and move it away? A. No. Move it?

Q. Yes. A. I don't follow your question.

Q. You had a snack bar in Tamuning?

A. That is right.

Q. Didn't you rebuild that snack bar and take the original one out?

A. Oh, that was after I left. That was done in '53 some time.

Q. After you left? A. Sure.

Q. When you ordered this glass from Fuller, how did you direct them to send the statement for the glass?

(Testimony of Joseph A. Siciliano.)

A. Probably to me or Pacific Enterprises; I don't remember.

Q. Why?

A. Because everything we done was through my office because of the freight and the shipment was to come from San Francisco. That is probably why, too.

Q. Why didn't you direct that that statement be sent to Mr. Thompson who was doing all of the Stateside ordering for Dairy Queen?

A. He wasn't doing all the ordering. He wasn't going to after we got it set up.

Q. The testimony was he placed those [34] orders.

A. Oh, he did at the beginning.

Q. Why didn't you have them send the statement to him since he had already dealt with that firm?

A. It wouldn't make any difference to me who they sent it to. I asked him who to buy glass from and he told me the Fuller Company. It didn't make any difference if it was paid.

Q. This was paid out of Pacific Enterprises funds?

A. It wasn't paid because the glass was never sent.

Q. The rest of the construction was paid out of Pacific Enterprises funds?

A. That is right.

Q. Did you ever advise Mr. Thompson that it was paid out of Pacific Enterprises funds?

(Testimony of Joseph A. Siciliano.)

A. He must have known it.

Q. I am asking you—did you advise him?

A. By letter, no.

Q. Did you advise him any other way?

A. Just by talking that we did it through Pacific Enterprises.

Q. Can you account for the fact that it doesn't appear on the books?

A. Yes; the only reason I can account for it because of the cost to Mr. Thompson and I told the office not to bill him with anything that they were afraid of making too high or too low because it wouldn't be right. I had a lot of surplus stuff [35] around the yard and they didn't know what price to put on this stuff so they wanted Mr. Thompson and I to get together and place a price on the things.

Q. So it was estimated cost on this?

A. Yes; some of them—the reefer panels, that is right.

Mr. Phelan: I have no further questions.

Examination

By the Court:

Q. This was to be used to serve root beer, sandwiches and no coffee?

A. It was used for root beer, sandwiches and milk.

Q. And it was used for the school trade?

(Testimony of Joseph A. Siciliano.)

A. We wanted it for the school trade because we were getting it at the Dairy Queen.

Q. Where did you get your school trade?

A. From the George Washington school—they would come up there.

Q. This location is not close to George Washington school at all? A. That is right.

Q. It is closer to Adelupe?

A. Yes; I figured they would come down and buy.

Q. Were you thinking of the noon trade?

A. Not only noon, no; afternoon, around 3:00 o'clock, after school.

Q. Well, your school trade after school is not sandwich [36] trade, is it? I was thinking of lunch trade. Ordinarily, after-school trade isn't a sandwich trade.

A. Well, you would be surprised how many people have ice cream and root beer and soda—it is a combination.

Q. Well, you do agree that the people who buy ice cream, as a class, are not those who are interested in hamburgers and coffee and that sort of thing?

A. I certainly do. That was the reason for the milk bar—that was the idea of the milk bar.

Q. Did you have any architect?

A. I never had an architect. I was going to design it exactly like the Dairy Queen. I have done quite a bit of building and the boys know how I wanted it done.

(Testimony of Joseph A. Siciliano.)

Q. Were any plans submitted before it was built? A. No, just——

Q. How long did you think it was going to take, Joe, to build it?

A. How long? A month and a half. As far as we could do it we would do it.

Q. A month and a half. That would bring us to the middle of August. Now, why was it never opened and used for that purpose?

A. Well, because the glass was stopped. The glass didn't come and my boys were stuck because we didn't want to change the appearance from the Dairy Queen. In order to keep it in line we needed the glass front and glass side and everything [37] else and that is the reason they stopped. The glass didn't come out.

Q. The Fuller Company is not the only company that sells glass?

A. Oh, no, but we wanted the same thing.

Q. You could have gotten the same thing from some other company?

A. Yes, but it is always best to get it from the same company that had sent it out and I didn't want to make any mistakes on that. When it didn't come out Mr. Turner or anybody else in my office didn't give orders on it.

Q. In other words, it comes back to time after time in your absence people didn't take care of things? A. I wouldn't say that, sir.

Q. Your group just let it lie?

A. I have a large organization——

(Testimony of Joseph A. Siciliano.)

Q. If you had been here something would have been done?

A. The only reason that it was not completed was because the glass was stopped and I did not know the order was stopped until months later.

Q. Didn't anybody in Guam tell you how your businesses were getting along?

A. Oh, yes; Mr. Lyle Turner wrote and said everything was going along nicely and I got letters from Lyle Turner telling me not to worry about anything. When I phoned Mr. Thompson and found the addition was stopped on account of the [38] glass and Mr. Thompson didn't like it and I didn't call and get it. I knew Mr. Thompson didn't like it and his stockholders and I didn't push the issue. I didn't want to have a man get in trouble with his stockholders over the thing so I just let the thing drop.

Q. Now you said your initial conversation about this building was before the contract. You made provisions in that contract for the payment of $8,000 out of profits which represented the unpaid balance? A. That is right, exactly.

Q. Now if you had this understanding and if you know why did not the agreement provide that your cost would similarly be paid out of profits for the addition to the building?

A. Well, we had no way of knowing what the cost would be or anything else.

Q. Well, you wouldn't have to just add it to your capital account; you would have to pay it some way?

(Testimony of Joseph A. Siciliano.)

A. Well, I was going to pay it out of Pacific Enterprises money.

Q. With no understanding as to how it would be paid for?

A. Oh, when we knew how much it cost—we had no bill—because that would be it. I trusted Mr. Thompson just as he did me. I was going to go ahead and build it on his say-so. He knew I could build it very cheaply because he has seen my snack bar and other restaurant and it is a fact everything I have on [39] Guam I built myself much cheaper than any contractor or builder.

Q. The fact remains it was never used for the purpose for which it was built?

A. It was never used for that. The work was stopped.

The Court: Very well.

Mr. Bohn: No further questions.

Mr. Phelan: None at this time.

Mr. Bohn: We have here the foreman in charge of the construction.

The Court: He may testify.

Mr. Bohn: Albert, will you step forward, please?

MR. ALBERT B. PADUA

called as a witness by the plaintiff, was duly sworn and testified as follows:

Direct Examination

By Mr. Bohn:

Q. Albert, would you give us your full name, please? A. Albert B. Padua.

(Testimony of Albert B. Padua.)

Q. How do you spell that? A. P-a-d-u-a.

Q. How long have you been on Guam?

A. I have been on Guam since 1948.

Q. Where are you now employed?

A. I am employed with Jones and Guerrero.

Q. And when did you first go to work for Jones and Guerrero? [40]

A. Almost a year and a half.

Q. And where were you working prior to that time?

A. Since I arrived on Guam I was working with Mr. Siciliano.

Q. And you were working with his organization just before you went to work for Jones and Guerrero? A. Yes.

Q. That is the only two employers you have had on Guam, is that right? A. Yes.

Q. Now, what kind of work do you do?

A. I do the utility construction and I did the addition for the corporation of Mr. Siciliano.

Q. What was your position?

A. Construction foreman.

Q. How many men did you have working under you in 1952, roughly?

A. 14 men—sometimes eight, not less than eight men.

Q. Never less than eight and sometimes 14?

A. Yes.

Q. Did you build the present Pacific Enterprises snack bar in Tamuning with your crew?

A. Yes, sir.

(Testimony of Albert B. Padua.)

Q. You built that all yourself? A. Yes, sir.

Q. Now, calling your attention to June and July of 1952, [41] were you in charge of the construction of an addition to the Dairy Queen building?

A. Yes, sir.

Q. Who gave you instructions to start that construction? A. Mr. Siciliano.

Q. Do you recall about when that was?

A. I can recall that Mr. Thompson is with him at the time he told me to begin the construction.

Q. You mean Mr. Thompson was there when he told you to start? A. Yes, sir.

Q. You have forgotten the date?

A. Yes; I forget.

Q. What instruction was given?

A. The instruction was given to me—they even give me the blueprints of the Dairy Queen Building to follow the same exactly.

The Court: Who gave you the blueprints?

A. Mr. Siciliano.

Q. (By Mr. Bohn): Were you present at the Dairy Queen when both Mr. Siciliano and Mr. Thompson were there? A. Yes.

Q. Did you measure off the space from it the new addition was going to go?

A. Yes, sir. [42]

Q. Were they both there?

A. They were measuring there.

Q. All three of you were there together?

A. Yes.

(Testimony of Albert B. Padua.)

Q. Now, about when did you start this construction?

A. I could not tell you the exact date but I know I began plotting the foundation of that when Mr. Siciliano was still here.

Q. Would it have been about the 1st day of July, 1952? A. Close to that.

Q. Now, do you recall how long it took you to complete that construction?

A. I think the time sheet will show. I think it's around a month and a half. I could not tell you exactly how long we built it.

Q. Did you turn the time sheets in to Henry Diza?

A. Yes, sir; at the time we finished the building I turned in the time sheet.

Q. Did you also turn in the starting time?

A. Yes, sir.

Q. Was this a continuous operation, this construction project? A. It was continuous.

Q. And you put men on to complete it?

A. Yes.

Q. And once you got started you just kept right on going [43] until you finished, is that correct?

A. Yes.

Q. Now, did you compute—withdraw the question. I have here a list of materials which were purported to have gone into the building. Can you identify these materials as to whether they went in there? A. Yes.

(Testimony of Albert B. Padua.)

Q. The first one is 65.33 board feet of wood for roofing support. Did that go in there?

Mr. Phelan: I don't think this is the proper proof. I think the invoices are.

The Court: It is proper proof as to the use of the material; not proper proof as to the value of the material.

Mr. Bohn: I concur with your Honor.

Q. (By Mr. Bohn): Did you put the 65.33 board feet of wood for roofing support in that building? A. Yes, sir.

Q. Did you put 27 4 x 8 x ¼ plywood panels in there? A. Yes, sir.

Q. Did you put one solid door in?

A. Not only one; we had one in the partition and two in the back.

Q. So you put in three solid doors? Do you recall where you got those solid doors?

A. I got them from Pacific Enterprises warehouse. [44]

Q. So it's three solid doors?

A. One solid; the two at the back are half panels.

The Court: Are these new doors?

A. New doors; they have never been used; new doors.

Q. Did you put in eight pieces of Cellotex in the building? A. Yes.

Q. Where did you put the Cellotex?

A. In the ceiling in the back of the partition, in across the tile, the acoustic tile. That acoustic tile belongs to Mr. Thompson.

(Testimony of Albert B. Padua.)

Q. That was on the ground?

A. No; in the ceiling.

Q. I see; you didn't put that in?

A. It's right in the ceiling now but besides the acoustic tile there is another layer of Cellotex to double it.

The Court: I don't want to interrupt counsel but my question remains at this time. There is an $800 item here for a septic tank. Didn't the testimony show that the septic tank was essential for both operations?

Mr. Bohn: It is my understanding that the original septic tank went haywire and they had to put in another for both operations.

The Court: I think Mr. Thompson said an oil drum was put in by the original contractor. This septic tank was necessary for the operations? [45]

Mr. Thompson: Not for $800. We spent at the new store at Seattle where they have the highest labor costs in America—we paid $245 for another septic tank just outside the city limits, installed, and $250 not installed in King County just three miles outside the city limits. We paid $245 for a septic tank installed and I think the cement worker there gets about $25 a day. This $800 is way too high.

The Court: But the septic tank is being used?

Mr. Thompson: The septic tank is there.

The Court: The court will take a recess and I was going to ask counsel if counsel has any objection if during the noon recess I go down and inspect this building and see what this is about?

Mr. Bohn: We would appreciate it.

The Court: I notice the price sign appears to be posted on the side of this building.

Mr. Bohn: 1:30, your Honor?

The Court: Yes.

Mr. Phelan: It is perfectly all right.

The Court: We will recess until 1:30.

(The court recessed at 12:05 p.m., February 17, 1955, and reconvened at 1:30 p.m., February 17, 1955.)

The Court: The court would like the record to show in this case that pursuant to agreement of counsel, the court inspected the addition in its present state at the site of the Dairy Queen [46] and found that it consists of three rooms at the present time—one long, narrow room in the back of the addition which is used for office and limited storage, a small living room without any outside light, no ventilation, and a reasonably sizable bedroom, similarly without outside light, in which a shower has been affixed. The living quarters are air conditioned, however. But judging from the design of the addition the addition was not accessible from the ice cream portion of the operation, nor was it designed to be accessible. In other words, it was not built flush with the extension which constitutes the sales and mixing portion of the ice cream operation nor was there any door connecting the addition, nor would a door which could have been cut have been practical since the door would have had to have been inserted beyond the partition of the ice cream

sales portion of the building. I mention these things because they may be subject to explanation by the witness who is now upon the stand, but it would appear that in following Mr. Siciliano's version of the use to which this addition was to be put, that if during slack periods one person was on duty he could not have sold ice cream at one window and a sandwich at another window without going out the rear door of the ice cream portion and going in the rear door of the other building in order to serve the same customer, which would indicate again, subject to explanation, that this was to be operated as a completely separate type of business without the use of the joint facilities. Now the record will show that, [47] subject to being corrected by the testimony.

Mr. Bohn: I beg your pardon. Albert has not yet returned. However, I do have one matter to call to your Honor's attention and with your permission I will call another intervening witness until Albert has returned. He must have been delayed somewhere along the line. The matter I wish to call to your Honor's attention is that we have reached an agreement on several of the other items. Your Honor will recall, more specifically, one thing I am referring to now, item VII on page 1. Your Honor, that is $35 a month for storage. Your Honor will recall that Mr. Thompson said that the only misgiving he had about that was the starting date. In order to avoid unduly imposing upon the time of the court and everyone else, just before the trial started I asked him if he would accept a July 1st starting

date and he said he would. I apologize, Mr. Phelan, that I did this in Mr. Phelan's absence but we were standing here.

The Court: That storage runs for how long?

Mr. Bohn: It runs from July 1 to April 2, is the date we have here, so for ease in figuring it, we run it from July 1 to April 1.

The Court: April 2, 1953?

Mr. Bohn: Nine months at $35 per month.

The Court: That is $315?

Mr. Phelan: $315 is the way I figure it.

Mr. Bohn: $315 is also the way I figure it. [48]

The Court: Very well, the item of storage which was subject to proof, will be accepted as being $315.

Mr. Bohn: There are some small items here. Henry, would you take the witness stand?

MR. ERNESTO O. DIZA

was called as a witness by the plaintiff, was duly sworn and testified as follows:

Direct Examination

By Mr. Bohn:

Q. Mr. Diza, you have already been identified in the companion case as being the accountant for Pacific Enterprises, is that correct?

A. That is right, sir.

Q. You are still the accountant for that corporation? A. That is right, sir.

Q. You were the accountant for that corporation for the period from June 22 up to the present

(Testimony of Ernesto O. Diza.)

time, is that correct? A. That is right, sir.

Q. Now, I am going to ask you about some items. Do you happen to have with you a duplicate list of this list you gave me? A. I have, sir.

Mr. Phelan: If it please the court, I think that his memory is not the proper proof of these items. I think that the records should be brought in.

Mr. Bohn: Now, if you will just be patient, Mr. Phelan, [49] I am going to introduce some records in an orderly manner.

The Court: Yes; go ahead.

Q. (By Mr. Bohn): Now, on page 10, supplies issued Dairy Queen from Pacific Enterprises own stock. For your general information I will say to you, in order to speed up your testimony, some of those items have already been agreed to, so we will go to the first item—two gallons of imitation vanilla flavoring at $1.43 a gallon. Do you have anything to indicate that that was delivered to the Dairy Queen?

A. I have the issue slip.

Mr. Bohn: All right, now I have here a whole series of issue slips. Do you want to examine each one of them?

Q. (By Mr. Bohn): I hand you a series of what purports to be the so-called issue slips and I will ask you to find for me the one that refers to imitation vanilla flavoring.

A. These are the disbursement slips.

Q. Where are the issue slips? Are these they?

A. That's it, sir.

Mr. Bohn: Perhaps in the interest of saving

(Testimony of Ernesto O. Diza.)

time—I have no objection to excusing the witness temporarily and let Mr. Thompson go through these issue slips if that would meet with the approval of court and counsel.

Mr. Thompson: These are slips for our own merchandise. They did not belong to Pacific Enterprises—our own merchandise. We don't have to buy them again. [50]

Mr. Bohn: Let me find this particular one.

Q. (By Mr. Bohn): Find me the issue slip, Mr. Diza, that involves two gallons, imitation vanilla flavoring.

Mr. Bohn: Again, your Honor, not wishing to impose upon your time, we are only dealing in all these series with something less than $30. Perhaps Mr. Diza could be excused and find these slips from Mr. Thompson and show them to you and to him.

The Court: Under that general heading you are dealing with one item of $78.

Mr. Bohn: Oh, that is true—$78 and $19—I temporarily overlooked that.

The Court: Now it is my understanding in these items that these were not posted to a debit account against Dairy Queen?

Mr. Phelan: That is what Mr. Diza testified in the other case if I am not mistaken. He said none of them had been posted to Pacific Enterprises books.

The Court: He said some had but I don't know just what.

Mr. Bohn: I am just embarrassed to be taking so much of the court's time on these.

The Court: You should be, Mr. Bohn. The evidence you want to present should have been organized.

Mr. Bohn: I had intended that Albert, the other boy, would get back on the stand and, therefore, it could be done. May I ask that this witness be temporarily excused and I will call Joe Meggo to the stand while he is finding these various [51] items?

The Court: Yes; I think you should have all of the records in chronological order before you present them.

Mr. Bohn: I concur, your Honor.

The Court: Very well, you may be excused, Henry.

Mr. Bohn: You may be excused, Henry, and may he remain in the courtroom to sort those slips?

The Court: Yes; there was no motion made for the segregation of witnesses in this case and I don't see any reason for it, either.

MR. JOSEPH MEGGO

called as a witness by the plaintiff, was duly sworn and testified as follows:

Direct Examination

By Mr. Bohn:

Q. Mr. Meggo, you have already been identified in the companion case as the individual who was supervising the operations of the Dairy Queen during the period from June 22, '52, to April in '53 at

(Testimony of Joseph Meggo.)

which time supervision was taken over by Norman Thompson. Now there are several items of an account which we are presenting, claiming reimbursement for Pacific Enterprises, and I desire to ask you a series of questions about some of these items. One of the items is item No. IV on page 1 of my particular list, rent for reefer truck, and the language used is, "Storage for pints and quarters (ice cream) at $2.50 per day from [52] June 22, '52, to July 31, 1953." Now, Mr. Meggo, was there a reefer truck used in connection with the operations of Dairy Queen during the period of your supervision? A. There was.

Q. Will you describe the truck?

A. It's a Ford truck, reefer truck, white. On it is "Harmon Field Restaurant." It belongs to Pacific Enterprises.

Q. Now the word "reefer" implies a refrigerated truck, is that right? A. That is right.

Q. Now you said you used that in connection with the operation of ice cream, to store ice cream and to deliver it to the store?

A. Wholesale business and delivery to the store.

Q. When did the wholesale business start?

A. Oh, '53, early '53.

Q. When did it terminate if you know?

A. I don't know that.

Q. Was the wholesale business still continuing at the time you left the management? A. Yes.

Q. And was it your understanding that it continued up through July 31, 1953?

(Testimony of Joseph Meggo.)

A. Yes; it did.

Q. Now, what sort of storage was on the premises for storing [53] pints and quarts of ice cream or any other size of ice cream except this reefer truck? A. I don't follow you on that.

Q. Well, what other storage was there at the Dairy Queen for ice cream?

A. Oh, we had a back room.

Q. And did you have any refrigeration or freezers? A. In the back?

Q. Yes. A. No, sir, in the front.

Q. Just in the front? A. Yes, sir.

The Court: You had your walk-in.

A. Well, that is just for the mixer.

Q. What freezer did you have in front?

A. A small three-door reach-in below.

Q. Three-door reach-in below?

A. (Nods head.)

Q. Was that used to capacity all of the time?

A. All of the time.

Q. And is it your statement to this court that you found it necessary for additional capacity? Is that the reason you used the reefer truck?

A. That is right; that is why we used the reefer truck.

Q. About how much ice cream did you store in the reefer [54] truck each day?

A. Oh, about two batches.

Q. Now, how much does that mean?

A. 40 gallons, 40 or 45 gallons.

Q. You would store between 90 and 85 gallons

(Testimony of Joseph Meggo.)

each day? A. That is right.

Q. This was hard ice cream, was it?

A. Yes, hard.

Q. Did you use this reefer truck every day?

A. Every day.

Q. Where was the truck kept?

A. Alongside the building.

Q. At the Dairy Queen?

A. At the Dairy Queen.

Q. Now, how much wholesale were you doing at the time you managed the store?

A. The only wholesale—we supplied Pedro Ada's stores, one in Barrigada and one in Agana.

Q. How much ice cream would you sell them during the day or week?

A. Every other day 150 quarts.

Q. And you used this truck to deliver the ice cream? A. We did.

Q. Was there any other truck or facility at Dairy Queen through which you could make these deliveries? [55]

A. No, not with ice cream. Ice cream you couldn't do that. You need refrigeration for ice cream.

The Court: Mr. Meggo, would you have needed the truck except for wholesale business?

A. No, we needed it for storage, too.

The Court: But it's primary purpose was to build up the wholesale?

A. Not exactly. We had to harden the ice cream for people to take home because when it comes out

(Testimony of Joseph Meggo.)

of the machine it is soft ice cream, so we had to store it for them.

Q. (By Mr. Bohn): Did you use the reach-in cabinet, too, for hard ice cream?

A. No, we used the reefer truck.

Q. You testified earlier that there was a refrigerator, a reach-in box, in the front of the store. Did you use that also for storage of quarts and pints? A. We did to serve at the window.

Q. Then when you ran out of stock in the reach-in box you would replenish it from the refrigerator truck? A. From the refrigerator truck.

Mr. Bohn: I have no further questions. I beg your pardon. I have some questions on some other points.

The Court: Aren't you going to clear up any other evidence?

Mr. Bohn: Yes, I am going over other points in the list.

The Court: I don't follow you. You don't expect to put [56] witnesses on and off?

Mr. Bohn: I misspoke myself. I want to continue with this witness and go over the other points in the complaint.

Q. (By Mr. Bohn): Now, do you recall about—withdraw that question. While you were managing the Dairy Queen store, did you have occasion to call upon the services of an electrician? A. I did.

Q. What sort of services would an electrician perform at the Dairy Queen?

A. Well, for awhile I had to call him down when

(Testimony of Joseph Meggo.)

a fuse would go out. They had it hooked up with very poor wiring and there was a shortage that would knock the fuses out, so the inspector came there and told me I would have to change the fuse box—it was very dangerous—so I ordered one from the States. I had to keep on checking it to watch so I didn't overload the wires. When we did get the switch box, I had to rewire the building.

Q. So you had an electrician rewire the Dairy Queen building? A. Yes.

Q. Did he install a new switch? A. Yes.

Q. And you gave that time to the bookkeeper?

A. I did.

Q. Now, did you have occasion also to call upon refrigeration [57] mechanics? A. Yes.

Q. What sort of work would they do?

A. The ice cream machine—the belt would expand a little bit—they would tighten it up. They worked on the walk-in reefer and the air conditioners.

Q. What would they do, for example, to the walk-in refrigerator?

A. They had to change the unit for more compression.

Q. What was wrong with the original unit?

A. It was knocking and we had to install a new compressor.

Q. That was in the walk-in box? A. Yes.

Q. And did you give the time of the refrigeration mechanics to the bookkeeper? A. I did.

(Testimony of Joseph Meggo.)

Q. This was all during the period that you were managing the store? A. Yes.

Q. Now, do you recall having ordered two gallons of imitation vanilla flavoring for Pacific Enterprises? A. For Pacific Enterprises?

Q. No, from Pacific Enterprises for use of Dairy Queen—two gallons of imitation vanilla flavoring?

A. I did. [58]

Q. What was that used for?

A. In the mix to make vanilla ice cream.

Q. And do you recall having ordered five rolls of mulch paper, 16 x 36? A. Mulch paper?

Q. I don't know what mulch paper is, do you?

A. No, I don't.

Q. Do you recall ordering five rolls of any kind of paper for the Dairy Queen?

A. No, we never used any paper.

Q. So you don't know what that would be? You have no recollection of that? A. No.

Q. Do you recall ordering plywood for the Dairy Queen? A. Yes.

Q. What was that used for?

A. For the extension.

Q. Where was that plywood obtained?

A. You mean on the building?

Q. Twelve pieces of plywood, 4 x 8 x ¼—do you recall ordering that? A. Yes.

Q. Do you recall who you ordered that from?

A. PCC—Pacific Construction Company.

Q. There is also an item here—200 pounds of granulated [59] sugar——

(Testimony of Joseph Meggo.)

The Court: Do I understand that this plywood went into the extension?

A. Yes, sir.

Q. Do you recall ordering 200 pounds of granulated sugar for the Dairy Queen?

A. Well, usually we ordered direct from the Dairy Queen—excuse me—no, the powdered sugar I got from Pacific Enterprises.

Q. This is granulated.

A. Mr. Thompson, himself, ordered it. We ordered from him.

Q. So if there is a charge for 200 pounds that is wrong?

A. Well, usually—some times they run out and would have to borrow from Pacific Enterprises.

Mr. Phelan: I think this witness should testify from what he knows, not what might have happened.

Q. (By Mr. Bohn): You have no recollection of ordering 200 pounds from Pacific Enterprises?

A. No, sir.

The Court: If you had done so, do you think it is possible you would remember placing it?

A. I would remember placing it.

Q. (By Mr. Bohn): This other item is four boxes of Eagle straws. Do you have any recollection as to that? A. Yes, four cases. [60]

Q. That was for use at the Dairy Queen?

A. Yes, for the milk shakes.

Q. Now we have another item of lacquer, dark paint, one gallon. Did you use that in Dairy Queen?

A. Yes.

(Testimony of Joseph Meggo.)

Q. What did you use it for?

A. Finishing.

Q. And what did you finish at the Dairy Queen?

A. The moldings, the little stand, the serving bar—we lacquered all that.

Q. Do you recall also ordering two loads of crushed coral for leveling in front of the store?

A. Yes, I did.

Q. What was that used for actually?

A. Every time it rained it would fill in in front of the Dairy Queen all the time so I had to bring it in and level it up a little more. That was ordered from the inspection department.

Q. Where did you get the two loads of crushed coral? A. Koster and Whyte.

Q. Now there are some items also here with regard to the construction of a septic tank——

Mr. Phelan: If it please the Court, I believe this testimony is improper because I believe the books are the best evidence of these items.

The Court: Well, the testimony, of course, in the case [61] was that this witness was maintaining managerial supervision over this operation and the testimony is from his recollection that these items were purchased for use and, therefore, I think it is entirely competent for him to do so.

Mr. Phelan: I think it violates the better evidence rule myself.

The Court: Well, he is the best evidence if he ordered them.

(Testimony of Joseph Meggo.)

Mr. Phelan: I don't think so. I think the records would show whether they went down there or not. It is the best evidence and if the Court will note, he hasn't testified to a specific date over this period he remembers doing this. It is so vague it is impossible to pin it down.

The Court: Yes, well, outside of the plywood these seem to be ordinary supplies. Certainly the question as to whether lacquer was used should not be difficult. Certainly the light bulbs would be expected and the testimony is that the coral was required. That is not unusual at all—to level the premises. I see nothing wrong with this. He is now being asked, of course, about the cesspool.

Q. (By Mr. Bohn): Do you recall the construction of a new cesspool or septic tank?

A. I do.

Q. Can you tell the Court something surrounding the circumstances of that construction? [62]

A. We had to make a new cesspool or we had to close up. That was an order from the inspector.

Q. What was wrong at the time with the existing cesspool?

A. Too small. It couldn't take the continuous water running from the ice cream machines inside. It went back about 30 feet away from the building and set there—looked like a swamp. Nothing worked inside; the sinks were stopped up, so we had to make a new cesspool.

Q. Was that the result of a direct order from the health inspectors? A. It was.

(Testimony of Joseph Meggo.)

Q. Who constructed it?

A. Pacific Enterprises.

Q. Do you recall anything about the dimensions or type of construction?

A. Made of hollow block cement and we built a slab on top. We had to make two entrances on it and we had to put cement on top and a manhole on top in case we had to clean it out, and a trap on it.

Q. The figure placed in this account as the cost of that item is $800. Tell us how that figure was arrived at?

Mr. Phelan: First, you haven't shown he has any way of knowing how it was arrived at. I don't think there is the foundation to ask him what this $800 stands for.

Q. (By Mr. Bohn): Well, do you know where the $800 figure [63] comes from?

A. Well, no, sir. We had to hire a mixer and that was $25 a day.

The Court: You had to hire what?

A. A small mixer, cement mixer.

Q. (By Mr. Bohn): How many days?

A. I don't know.

Q. Did you have to buy the concrete blocks?

A. Yes.

Q. Where did you buy those?

A. Joe Dupree in Tamuning.

Q. Do you recall how long it took to install this item?

(Testimony of Joseph Meggo.)

A. Oh, I would say about three weeks off and on. In rain we had to stop.

Q. As I think I understand your testimony is this additional cesspool or septic tank was required for the use and continued occupancy of the existing Dairy Queen store? A. That is right.

Q. Out of which you were selling ice cream and other food products?

The Court: Was it contemplated that you connect the addition to it also?

A. No, we had to dig a new one altogether. We left the other one lay there. It is still there today.

Mr. Phelan: May I ask a question? You mean to say there [64] are now three cesspools down there? A. Yes, sir.

Mr. Bohn: This witness will be yours to cross-examine soon.

Mr. Phelan: I didn't think his answer was entirely responsive to the judge's question. I wanted to clarify it before it got loused up.

Mr. Bohn: Well, there is a way to do that by objection.

Mr. Phelan: I know.

Q. (By Mr. Bohn): Mr. Meggo, it is also claimed here that certain equipment owned by Pacific Enterprises was installed and used at the Dairy Queen. The first item is a three-quarter h.p. motor, Westinghouse motor. Do you know anything about the installation of such a motor?

A. Yea, we put one in.

Q. Put it in where?

(Testimony of Joseph Meggo.)

A. In the walk-in refrigerator.

Q. In the walk-in refrigerator?

A. That is right.

Q. Where did you get the motor?

A. From Pacific Enterprises.

Q. Was there already a motor in the refrigerator? A. Yes, there was.

Q. What happened to the one that was in there?

A. It was burned out.

Q. What did you do with it? [65]

A. We brought it back to Pacific Enterprises to see if we could repair it. We couldn't repair it. It had to be rewound.

Q. Do you happen to know where that old motor is now? A. Should be up there now.

Q. As you examined it it was useless?

A. It couldn't be repaired.

Q. Now there is a note here that there is a hot fudge heater belonging to Pacific Enterprises also installed at Dairy Queen?

A. Yes, it is still there.

Q. Was a hot fudge heater ever sent out to Dairy Queen from the States? A. No, sir.

Q. When was the last time you were in the Dairy Queen?

A. When Norman Thompson took over.

Q. You haven't been there since?

A. Never been there since.

Q. So when you say it is in there now—it was when you left? A. When I left.

(Testimony of Joseph Meggo.)

Q. What is this Universal condenser?

A. It is air conditioning.

Q. What does a condenser look like? What is it, a motor-type thing?

A. It's a gadget to blow air. [66]

Q. Where was that installed?

A. Above the door, the entrance to the storeroom.

Q. Was there any other condenser in the same location prior to this one? A. There was one.

Q. What happened to that one?

A. We took that back to Pacific Enterprises. It was a small one.

Q. Why did you take that one out and put in another one?

A. Because it wouldn't blow the air in. It blew hot air so we had to take it out.

Q. Do you know where the one now is that you took out?

A. The last time—at the Pacific Enterprises a week or so ago.

Q. There is another reference here to blowers. Do you have any recollection as to what that item is?

A. It is the fan that was installed in the wall or ceiling right behind the condenser to blow the cold air out.

Q. Was there a blower in there at the time you installed this one? A. Yes, there was.

Q. Why did you make the change?

A. For the reason it was blowing hot air. The condenser never got cold.

(Testimony of Joseph Meggo.)

Q. So the blower and Universal condenser were part of the [67] same operation, is that correct?

A. That is right.

Q. Again I ask you what did you do with the old blower which you took out?

A. It is at Pacific Enterprises.

Q. There is the item, air cooler evaporator. Tell us what you know about that?

A. Evaporator?

Q. Would that be an installation on the roof or what would that be? A. I can't recall that.

Q. Air cooler evaporator—you have no recollection as to what that is? A. No.

Q. There is another item here for a 1 h.p. deep freee? A. Yea.

Q. Do you recall that item? A. I do.

Q. Now did you get a 1 h.p. deep freeze from Pacific Enterprises and put it in the Dairy Queen?

A. I did.

Q. What did you use it for?

A. Storing ice cream.

Q. Was that the deep freeze compartment that you talked about where you walked from the counter? [68]

A. No, another one in reserve in the back in the new extension building.

Q. And the last time you saw it was it still there? A. It was still there.

Q. Did you remove any deep freeze or any other equipment and replace it with this deep freeze?

A. No, never did.

(Testimony of Joseph Meggo.)

Q. This was additional?

A. This was additional.

Q. The last item is a carrier compressor installed to walk-in reefer?

A. Well, what we did we used a carrier compressor to help out on air condition but for the walk-in reefer we only changed the compressor.

Q. In other words, there is a tie-in between the carrier compressor installed in the walk-in and the ¾ h.p. motor?

A. No, it's for the air conditioning.

Q. This was used for air conditioning?

A. Air conditioning.

Q. And you obtained that where?

A. Outside——

Q. Where did you obtain it?

A. From Pacific Enterprises.

Q. Did you remove anything from Dairy Queen?

A. No, never did. [69]

Q. That was another addition? A. Yes.

Q. Now with regard to this deep freeze, 1 h.p. deep freeze that you put in there. Was it a new one or secondhand? A. Secondhand.

Q. And how about the carrier compressor installed in the reefer? A. A used one.

Q. And this ¾ h.p. motor? A. Rebuilt.

Q. And what about the hot fudge heater?

A. Well, it was new.

The Court: On that point where did you get the $101 for a hot fudge heater?

(Testimony of Joseph Meggo.)

A. Sir, I did not make the price on the hot fudge heater.

The Court: By no stretch of the imagination could it cost $101.

A. You are right about that; I don't know.

The Court: It just involves a canister with a heating unit.

A. Yes, that is all it is.

Mr. Bohn: I have no further questions of this witness.

Cross-Examination

By Mr. Phelan:

Q. Now, Mr. Meggo, you said that the reefer truck was used [70] for storage of pints and quarts?

A. Yes, sir.

Q. I believe you said that you couldn't make enough during the day? A. That is right.

Q. So you had to store them out there. Well, when did you make them that were stored out there?

A. Between shifts.

Q. What time of the day would that be?

A. There is always four boys.

Q. I didn't get that.

A. When we break the shifts up there is always four boys there for about one hour.

Q. So you made it during that one-hour period?

A. Oh, no, if we were not busy we just continued to make quarts and pints.

Q. How many quarts and pints would you make and store a day? A. Oh, I don't know.

(Testimony of Joseph Meggo.)

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Q. So you made it during that one-hour period?

A. Oh, no, if we were not busy we just continued to make quarts and pints.

Q. How many quarts and pints would you make and store a day? A. Oh, I don't know.

(Testimony of Joseph Meggo.)

Q. Have you any idea? A. 100 or 150.

Q. How many would you store in the deep freeze in the store?

A. That I don't know—90.

Q. Now you said you made two batches? [71]

A. A batch and a half—approximately a batch and a half.

Q. And you would have 80 or 90 to store?

A. All you can get out of a batch.

Q. Isn't that your testimony?

A. Yes, approximately.

Q. That would be 360 quarts that you stored?

A. No, you can't store it all. If you have a slow day we can stock up but if you sell continuously then we can't stock up.

Q. Now how much did you get from a batch? How many quarts would a batch make?

A. I can't recall.

Q. What do you mean by a batch?

A. Well, a whole mix.

Q. Isn't it a fact that the mix was 10 gallons?

A. I can't remember—between 40 and 50 gallons.

Q. Isn't it a fact that the mix was ten gallons?

A. No, it is more than ten gallons.

Q. You are positive? A. Sure.

Q. How much more?

A. 45 or 50 gallons.

Q. You are positive of that? A. Um huh.

The Court: Let's understand what you are talk-

(Testimony of Joseph Meggo.)

ing about. [72] Are you talking about a mix for one machine?

Mr. Phelan: I mean the unit of unfrozen material going into the machine would be one batch of mix. You recharge your machine for the next batch; the liquid material to be frozen.

The Court: That is what is stored in the deep freeze, the walk-in?

Mr. Phelan: Stored in a chilled position and put in the reservoir of the machine in ten gallon batches.

The Court: That is what I am asking. Are you talking about that which goes into the machine or talking about that which is mixed.

Q. (By Mr. Phelan): Now how long a period did you sell wholesale?

A. Oh, I can't remember now. They are still selling wholesale yet today.

Q. I am asking when you were there. Did you sell any wholesale in July? A. Yes.

Q. Of '52?

A. Not '52, the late part of '52.

Q. When did you cease selling wholesale when it was under your control?

A. I can't remember that.

Q. You can't remember?

A. No, it's in '53, the year '53. [73]

Q. Do you remember what month?

A. No, I can't remember that.

Q. You sold up to some time in '53?

A. Yes, we did.

Q. You sold quarts and pints? A. Yes.

(Testimony of Joseph Meggo.)

Q. Who to? A. Pedro M. Ada.

Q. How did you sell? Was it cash or charge?

A. No, charge.

Q. How often was that paid?

A. Once a month.

Q. You said you made deliveries every day?

A. Every afternoon.

Q. How large were your orders?

A. Oh, between 125 and 150 quarts and pints every day.

Q. Would it be pints or quarts or both?

A. Both.

Q. Some packed in pints or some packed in quarts? A. 150 pieces.

Q. Now there would be twice as much ice cream if you sold quarts than if you sold pints?

A. That is right, but pieces.

Q. Now how many quarts was it divided into and how many pints? [74]

A. It all depends how much they had up there. They would check and we would replace them.

Q. Do your books show the number of pints and quarts? A. Yes, they did.

Q. How much was the price per quart and the price per pint? A. I don't remember that.

Q. The books would show that?

A. Yes, the books would show that.

Q. And that was the wholesale price?

A. That was the wholesale price.

Q. Do you know whether or not that was entered into the books? A. I wouldn't know that.

(Testimony of Joseph Meggo.)

Q. Did you receive the payments for it?

A. Well, all the signed slips I would give to the Pacific Enterprises office.

Q. Now you relied upon the books? To the best of your knowledge they were entered into the books?

A. Yes.

Q. How many quarts or pints would the deep freeze hold, do you know, that was used down there in the store? A. I don't know—80 or 90.

Q. Do you know what cubic capacity they were?

A. No. [75]

Q. The deep freeze?

A. We have two sizes.

Q. Now this used one that you brought down. Do you know the capacity of that one?

A. No.

Q. And you said that the used deep freeze you brought down was put in the extension?

A. In the extension.

Q. When was that brought down? A. '53.

Q. When in '53?

A. Well, after we finished the extension.

Q. When did you finish the extension?

A. Well, we couldn't finish it right away because we was held up for glass. We stopped work until the glass came in.

Q. Did the glass come in? A. No.

Q. Then you couldn't finish until you got the glass, just the glass?

A. Yea, we had everything else.

Q. When did you put the deep freeze in?

(Testimony of Joseph Meggo.)

A. Well, we put the deep freeze in in September, '53.

Q. About September, '53?

A. That is right.

Q. How long did you run this business? [76]

A. Since '52, since Siciliano left the island.

Q. When did you cease running this business?

A. Sir?

Q. When did you stop running the business?

A. When Thompson came in.

Q. When did he come in?

A. Oh, I don't remember.

Q. You didn't put that second deep freeze down in there until September, 1953?

A. Yea, approximately; I can't remember exactly.

The Court: I think the witness should be asked to correct his testimony. Are you talking about September, '53, or September, '52?

A. No, sir, '53—'52.

Mr. Phelan: I don't think this witness knows what he is talking about.

The Court: Well, he can very easily make a mistake in year but not in months. As I understand it you put the deep freeze in there while this building was still under construction? A. Yes, sir.

The Court: And you started constructing it somewhere around the first of July, 1952?

A. Yea, that is right.

The Court: Is it your testimony now that you put it in in '52? [77]

(Testimony of Joseph Meggo.)

A. Late '52.

Q. (By Mr. Phelan): Did you talk to Mr. Thompson when he was here around New Years of 1952? A. Senior?

Q. Yes. A. We said "hello."

Q. You just said hello?

A. We didn't talk much more. He asked how the business was doing. I said "Fine"; that is all.

Q. Were you down there at the Dairy Queen?

A. Yes, twice I seen him.

Q. Did you discuss the additional deep freeze with him? A. No, not exactly, no.

Q. He didn't tell you that you didn't need another deep freeze? A. No.

Q. Were you using the reefer truck at that time?

A. It was down at the Dairy Queen, yes.

The Court: It was down at the Dairy Queen?

A. Yes, sir.

The Court: Did Mr. Thompson comment on it?

A. No, he seen it but never said anything about it.

Q. (By Mr. Phelan): At the time was the deep freeze that was installed originally in the store full of ice cream?

A. Yes, it always had ice cream in it for the store. [78]

Q. Now I am going to ask you what you used the imitation vanilla flavoring for

A. Flavoring for ice cream.

Q. Now did you use it in the ice cream?

(Testimony of Joseph Meggo.)

A. Yea, in the ice cream. All flavoring was in the ice cream except for toppings that goes on sundaes, so Mr. Thompson sent a special flavoring for ice cream and I would make it and that is why we followed his order.

Q. Why this imitation vanilla?

A. We didn't have any so we had to have something to replace what Mr. Thompson sent.

Q. Do you recall when you used it?

A. I can't recall back.

Q. Can you recall approximately?

A. Not even approximately.

Q. Can you tell me how much vanilla you used to a unit of mix?

A. Well, I can't tell—32 ounces, something like that; I can't recall.

Q. Mr. Meggo, I believe the other day you testified that you were an experienced operator of the ice cream business, that you ran the plant up at Harmon Field? A. At Harmon Field, yes.

Q. Now how much vanilla exactly would you use in ten gallons of mix? [79]

A. You got me on that.

Q. For ten gallons of mix would you use a gallon of extract? A. I don't know.

Q. A quart?

A. Like I say, Mr. Phelan, the idea when I came to Guam in 1949, Siciliano had Harmon Field Restaurant and ice cream plant at 20th Air Force. It was in operation. They were making ice cream. I didn't follow it by learning it up there.

(Testimony of Joseph Meggo.)

Q. You didn't see them mix it?

A. Not exactly, no. They knew how to do it.

Q. What was this mulch paper used for, Mr. Meggo? A. I don't know what that is.

Mr. Phelan: Well, I will be honest, I don't. I presume it was some type of heavy paper.

The Court: What are you talking about now?

Mr. Phelan: This mulch paper.

The Court: I think we have to forget about that. He says he knows of no use for which paper of that size was put.

Q. (By Mr. Phelan): You say the plywood went into the extension?

A. Into the extension.

Q. How about these Lily cups, 8 ounce size?

A. Lily cups, yea.

Q. When did they go——

A. Pacific Enterprises. [80]

Q. When did they go down to Dairy Queen?

A. Since '52, the early part—July.

Q. What did they use those for?

A. On the ice cream. Well, to tell the truth the Lily cups were used for ice cream when we ran short of containers—we had to use the Lily cups.

Q. Would 8 ounce Lily cups hold any of the units that you were customarily selling?

A. We used containers and also the Lily cups.

Q. I don't follow you.

A. This ice cream mix—we used containers to serve it and the paper cups to drink it out of. That was when we were short of containers.

(Testimony of Joseph Meggo.)

Q. So you bought 200 of them.

The Court: What are we talking about here?

Mr. Phelan: I am just curious. I am just testing the witness.

The Court: Why do you want to test the witness to something that is already admitted?

Mr. Phelan: I think I have a right to test his memory.

The Court: You haven't the right to test his memory about something that isn't at issue.

Mr. Phelan: I didn't think you were held right down to issues in testing a witness' memory.

The Court: Of course you are. Why should he admit to [81] something that you admit? This item of Lily cups and what they were used for has been conceded by you.

Mr. Phelan: Yes.

The Court: We have enough other major items to go into without bothering with Lily cups which you have admitted you owe.

Mr. Phelan: I don't think the item of Lily cups is important but whether he has a good memory is very important.

The Court: Then ask him about something that is in dispute.

Q. (By Mr. Phelan): We come to equipment of Pacific Enterprises that you moved down there. This ¾ h.p. motor was a rebuilt motor?

A. Yea.

Q. Where did you get it?

A. Pacific Enterprises.

(Testimony of Joseph Meggo.)

Q. What did you do with the motor you took out?

A. Took it back to Pacific Enterprises.

Q. Was that rebuilt? A. We tried.

Q. You mean to say you tried or who tried?

A. Our electrician.

Q. Were you present when he did?

A. He called me down to the shop.

Q. He told you? Mr. Meggo, this hot fudge heater—where did it come from? [82]

A. Pacific Enterprises.

Q. When?

A. It was loaned from Pacific Enterprises to Dairy Queen.

Q. Yes, when was it moved down there?

A. I don't recall.

Q. You don't recall? A. Well, '52.

Q. What part of '52?

A. August or September—approximately then.

Q. This Universal condenser—when was that moved down there? A. That's in '52, late.

Q. What was done with the one that was replaced?

A. Took it back to Pacific Enterprises.

Q. Did they repair it? A. No.

Q. Was the one that they brought down new?

A. Yes.

Q. How about this blower?

A. That is new, too.

Q. What happened to the old one?

A. Pacific Enterprises has it.

(Testimony of Joseph Meggo.)

Q. Was that repaired? A. No.

Q. Do you know? [83] A. Yea.

Q. Now this air cooler evaporator?

A. I don't know what that is.

Q. You don't know what it is?

A. (Shakes head.)

Q. Do you recall while you were running that place down there any piece of equipment that you didn't know what it was for?

A. What is an air cooler evaporator?

The Court: Mr. Phelan, this witness says he didn't know what it was.

Mr. Phelan: If I was running a place like that—I am asking if there was any piece of equipment down there they didn't know what it was there for.

The Court: As far as his direct testimony is concerned he says he doesn't know anything about it.

Mr. Phelan: Can I ask him if there was something down there he didn't know what it was doing there?

The Court: Well, I don't know what bearing that would have. The plaintiff hasn't attempted to prove the existence of this item by this witness.

Mr. Phelan: He was supposedly the manager.

The Court: Didn't he tell you in the first place he doesn't know what an air cooler evaporator is? He asked you if you didn't know what it was. [84]

Mr. Phelan: I don't.

The Court: Let's assume we are dealing with total ignorance as to that since I certainly don't know what it is.

(Testimony of Joseph Meggo.)

Mr. Phelan: Well, I might have seen something in a room I didn't know what it was but I could recall it was there.

The Court: Well, that doesn't help us out.

Q. (By Mr. Phelan): Now this carrier compressor?

A. We only installed a compressor and replaced a motor.

Q. And the motor was a rebuilt job?

A. And we put it in there.

Q. Now didn't you say that some of this equipment you have been talking about here was used in connection with air conditioning?

A. One more unit outside.

Q. Where is the air conditioning unit?

A. Outside the building.

Q. Outside the building?

A. (Nods head.)

Q. What does it cool?

A. The air conditioner?

Q. No, what building? A. The salesroom.

Q. The air conditioning for the salesroom is outside the building? A. The unit, yea. [85]

Q. Now, this septic tank—you said a new septic tank had to be installed because of overflowing?

A. That is right.

Q. Now isn't it a fact that most of the water that would go through the septic tank was merely cooling water for the freezers?

A. Yea, cooling the freezers, cooling the freezon in it.

(Testimony of Joseph Meggo.)

Q. Is it clear water?

A. Yes, it is clear water.

Q. Now why did you have to build a septic tank to take care of clear water?

A. There was a lake around the building.

Q. Wouldn't it have been possible to build a soaking pit?

A. No, it was sea level. The water was continuously coming out from the two machines.

Q. It would go out faster from or through the septic tank than a soaking pit? A. No.

Q. I thought you said it was clear water?

A. Not to them. It was slopped outside around the building and they wanted us to keep it dry. They wanted no water lying around noplace.

Q. You couldn't run clear water to a soaking pit?

A. It couldn't soak there fast enough. Mr. Thompson knew himself we had to have a cesspool. We had to dig a latrine down [86] there too.

Q. Yes, I understand that. Now you talked about the time that these mechanics were down there. How do you know how long they were there?

A. Well, they were working to put a switch board in there. I worked all night with them and we were working in the daytime, changing the wires around it.

Q. How many electricians worked there?

A. One.

Q. How do you know the reefer mechanics were down there?

(Testimony of Joseph Meggo.)

A. Well, we always called Pacific Enterprises and they sent them down.

Q. Do you remember exactly how long they were there? A. Oh, not exactly.

Q. Did you ever have the number of hours?

A. Sometimes in the morning.

Q. Do you remember?

A. There was always a record kept in the office.

Q. You can't testify to the time at all?

A. Not the exact time.

Mr. Phelan: I have no further questions.

Mr. Bohn: I have no further questions of this witness.

Examination by the Court

Q. I want to ask if this reefer truck was owned by Pacific Enterprises before this started?

A. Yes, sir. [87]

Q. Did Pacific Enterprises have to buy another truck to replace it? A. No, sir.

Q. But if it was needed by Pacific Enterprises why was it available to Dairy Queen all day?

A. Well, the only time it was needed by Pacific Enterprises was when a reefer ship came in, to haul groceries and strawberries and stuff for the Dairy Queen.

Q. Did the use of it by Dairy Queen interfere in any way with the use of the truck when a reefer ship came in? Is it not your testimony it was there every day?

(Testimony of Joseph Meggo.)

A. There was no use bringing it back to Pacific Enterprises and unplugging it.

Q. If a reefer ship came in it had to be used. It was not at the Dairy Queen, was it?

A. Not exactly.

Q. The reefer truck was not at the Dairy Queen every day? A. There every day, yes.

Q. Except when a reefer ship came in or other Pacific Enterprises purposes. Again I ask you—it couldn't have been there every day? It couldn't be two places, could it? A. No.

Q. If you were unloading a reefer ship it might take you two or three days at a time?

A. No, sir, one day, sir. You could take everything off [88] the reefer in one day.

Q. Now how does this operate? How did you keep it cold—from a motor? A. Yes, sir.

Q. Hook-up? By a motor hook-up?

A. Yes.

Q. What did you do—run the motor a certain length of time? A. Continuously, yea.

Q. It cuts off automatically?

A. Maybe an hour or two every four or five hours.

Q. And then that cuts off and that gives you a freezing condition in the interior of the reefer?

A. Yes, sir.

Q. And I presume then the motor has to be run four or five hours a day, doesn't it?

A. If you open and close the door it comes on and she shuts off—it is automatic control.

(Testimony of Joseph Meggo.)

Q. You have to keep the motor going on an average of four or five hours a day?

A. The motors are built in the truck. It has a line hook-up.

Q. Is that a gasoline motor?

A. No, electric.

Q. But it must operate off the motor of your truck? [89]

A. It is a plug-in timer with an extension line on it.

Q. I see. In other words, the motor of the truck has nothing to do with it? A. No.

Q. What you do is plug in the reefer to an available electric outlet and then like any other deep freeze, the motor operates? A. Yes.

Q. But this was not acquired solely for the purpose of Dairy Queen? It was just simply making use of equipment that was already available?

A. Yes, sir.

Recross-Examination

By Mr. Phelan:

Q. In line with the Court's question, was it ever used to haul meats to the Talk of the Town or the snack bar in Tamuning? A. No.

Q. How did you haul your meats and frozen products to the store up there?

A. A closed-in truck—it only takes five minutes.

Q. For deliveries?

A. No, sir, just for the Dairy Queen.

(Testimony of Joseph Meggo.)

Q. Isn't it a fact that if you don't operate that type of vehicle every day for a period there, she will warm up and it will take several days to cool it down? [90]

A. Sure, that is right; that is why we never shut it down.

Q. Isn't it a fact the Dairy Queen was getting a flat rate for their power?

A. I don't know. I don't know how their power bills run.

Q. Isn't it a fact that you would have kept that thing chilled down whether it was used or not?

A. Sure; that is why we keep the truck up.

Q. So you kept the truck cold at all times?

A. Yes, sir.

Q. That was not only to keep it from getting warm but also to keep it in good condition?

A. Yes, sir.

The Court: If I understand counsel's question correctly, the cost of using the truck as storage by Dairy Queen was no greater so far as Pacific Enterprises was concerned than if it had just been kept idle?

A. Yes, but if it didn't have anything to do with Pacific Enterprises, we opened the doors up and shut it down.

Mr. Phelan: No further questions.

Mr. Bohn: No further questions.

The Court: Thank you very much. You may be excused.

Mr. Bohn: Now if your Honor please, we will recall Albert Padua, the construction foreman.

The Court: Very well. [91]

MR. ALBERT B. PADUA

previously called as a witness by the plaintiff, was recalled as a witness by the plaintiff and having been previously sworn, testified as follows:

Direct Examination

By Mr. Bohn:

Q. Now, Albert, I think that at the time you were excused last time we had reached the item of two panel units, 3 feet 10 inches by—well, I had best go back—the last question that I recall was I asked you about eight pieces of Cellotex and asked you if you installed eight pieces of Cellotex in that building, in the addition?

A. Yes, sir, it was installed, sir.

Q. Now I ask you about two panel units, 3 x 10 x 6? Do you recall installing those?

A. What is that?

Q. The description we have here is two each panel (unit) 3 feet 10 inches x 6 feet 6 inches.

A. Those are the walk-in reefer panels.

Q. Where were those bought?

A. It was part of the wall of the building.

Q. Part of the wall of the building?

A. Yes.

The Court: Would you find out why they had to use reefer panels for the wall of the [92] building?

(Testimony of Albert B. Padua.)

Q. These are secondhand reefer panels?

A. Brand new.

Q. Why did you use reefer panels for the wall?

A. Well, using the reefer panels is less expensive in construction. Instead of buying material for siding, plywood for siding, we might as well use the materials we had on hand.

The Court: What page is that on?

Mr. Bohn: Let's see—it is an unnumbered page. It is about page 4 of it where I am going through the materials used. Do you find that, your Honor? Or it may be page 5 on your list. I am working from the statement of August 1, '53.

Mr. Phelan: I think it is one or two pages ahead of the one your Honor is glancing at.

The Court: Well, I don't see these reefer panels.

Mr. Bohn: Under materials used—two each panel (unit) 3 feet 10 inches x 6 feet 6 inches.

The Court: I am on the page that says "Schedule A—Explanation for Item II."

Mr. Bohn: Now I am lost.

The Court: Now how many pages is it from that? How many pages is it from the last page?

Mr. Bohn: Five from the last. This is in the explaining page; this is the basic recapitulation. In other words, as I understand this page, beginning with the item PCC invoices, etc., those are scheduled later on in detail. [93]

The Court: He is testifying now to six each, panel sidings?

(Testimony of Albert B. Padua.)

Mr. Bohn: No, he is testifying as to two each. Apparently those two items are the same, however, and I perhaps should have asked the question touching the one which shows $50 each. The other shows $15.

The Court: And the same size panel, isn't that right?

Mr. Bohn: Yes, one is called panel sidings and the other is called panel unit. I do not know the difference. Perhaps I should ask him if these items 3 feet 10 inches by six feet six inches are reefer panels also.

A. Yes, and reefer units we use in the windows of the building.

Q. (By Mr. Bohn): In other words, we have an item here, six panel sidings. What are they?

A. They are the ones we used in the siding of the building. They are the louvers in the siding of the building. The material we used was reefer unit panels.

Q. Is that different from what we are talking about?

A. It is different. It is solid while the unit panels, there is an opening for the unit.

Q. Oh, I see. Well, then did you install six panel sidings? A. Yes, sir.

Q. And those are solid, you say, is that [94] correct?

Q. Did you also install two panel units?

A. Yes, sir.

Q. And those contain an opening for what?

(Testimony of Albert B. Padua.)

A. For louvers. It is in the building now.

Q. It is there now? A. Yes, sir.

The Court: What is the difference between the $15 and the $50?

Mr. Phelan: A $35 hole.

Mr. Bohn: Well, one of them provides for two and the other is six. There were six sidings installed and only two panel units, as I understand his testimony.

The Court: Yes, but each of the panel sidings is the same measurement, according to the figures here, and you are charging $50 each for those and you charge $15 each for the others—the same size.

Q. (By Mr. Bohn): Can you give us any explanation why one of these might be more valuable than the other?

A. The other is cheaper because it has a big opening where the unit is placed, if they are going to use it for a walk-in reefer.

Q. How big is the opening, 3'10" x 6'6"?

A. Yes, it is six inches around the side. The rest of that is the opening.

Q. Oh, I see. The unit is only a six-inch [95] frame? A. Yes, sir.

Q. And all the material inside the unit is opening for a window? A. Yes.

Q. The panel units were louvers for the windows and you used the six-inch frame where it remained left open, is that right? A. Yes, sir.

Q. To distinguish that, the panel siding is solid throughout? A. Yes.

(Testimony of Albert B. Padua.)

Mr. Bohn: Does that explanation clarify it, your Honor?

The Court: Now according to measurements, you have the same for each.

Mr. Bohn: The exterior measurement is the same.

The Court: Yes.

Q. (By Mr. Bohn): Is this the situation in the case of panel units—all you have is roughly a six-inch frame, is that correct? A. Yes.

Q. Something in the nature of a picture frame?

A. I think it is one foot at the bottom, that is all, and around six inches.

Q. So that it is six inches across at the side and top and one foot at the bottom and the rest is simply an opening? A. That is right. [96]

Q. Whereas in the case of panel siding it is solid pieces of siding? A. That is right.

Q. In other words, is 3-10 the width or height?

A. I am not sure of the height or width but I think the width is not less than 4 feet around, 4-6 or 4-7 inches.

The Court: These panel sidings are steel as I understand correctly? A. Galvanized steel.

The Court: Yes, is it necessary to put steel on the side of the panels?

Mr. Bohn: I didn't realize that they were steel.

The Court: Well, they could have used platinum but it isn't practical from the standpoint of cost.

Mr. Phelan: Between the sheets in the walk-in reefers there are layers of glass wool between.

(Testimony of Albert B. Padua.)

The Court: We haven't any evidence of their use except for siding of a building.

Mr. Phelan: They assemble these reefers by bolting these things together.

The Court: So you know something of reefer construction, but my point is why are the sidings used in connection with a building and not a reefer?

Q. (By Mr. Bohn): Can you tell us why?

A. Yes, according to my experience the Talk of the Town [97] is built of reefer panels, the snack bar is also built of reefer panels, the warehouse and office are all built with reefer panels, and that is designed for air conditioning. When instead of insulating a building for air conditioning you use reefer panels you save a lot of money by using the reefer panels in the building you are going to air condition.

The Court: You didn't have reefer panels all over the building, did you?

A. All reefer panels except the front is glass, your Honor, because that building was designed for air conditioning.

Q. (By Mr. Bohn): In other words, the insulation contained in these reefer panels is suitable for an air-conditioned room?

A. That is right, sir.

Q. It is your experience it is cheaper to build a building you intend to air condition out of reefer panels than to build it out of other material?

A. Cheaper and easier.

Q. You save labor as well as materials?

(Testimony of Albert B. Padua.)

A. Yes, sir.

Q. Now there is also contained the item of a septic tank here. Did you build a septic tank for the new addition? A. Yes, sir.

Q. How big a septic tank was that?

A. I am not sure; I think around 8 x 10 foot.

Q. Now what material was that constructed out of? [98]

A. The siding was solid concrete. The partition was——

Q. You built that in connection with this extension? A. That was built separate.

Q. Now that is what I want to know. How many septic tanks did you build on these premises?

A. We built one there but the construction of a septic tank has three holes in it.

Q. You only built one?

A. One big one but it has a partition of three parts.

Q. Was that built to serve the existing salesroom of Dairy Queen?

A. The only one there was constructed wrong. They opened the bottom of the septic tank. The place is very low and below sea level there is a tendency for the water to rise up and so my idea is to build a solid bottom to the septic tank. That is the reason we constructed a new septic tank there.

Q. Is it hooked into the existing building? Is it hooked into the salesroom that was there before you started the addition?

A. Which one is that?

(Testimony of Albert B. Padua.)

Q. I am trying to distinguish between the addition that was added to the building and the building that was there before you started the addition. Which building did you hook it into?

A. The old building because the new building was not used. No water was in there.

Q. So you hooked it up to the old building? [99]

A. Yes, the old building.

Q. And the septic tank you said was built wrong is hooked up to the old building, is that right?

A. Yes, and the medics required that we correct it.

Q. And it is 8 x 10, roughly and contains three compartments? A. Three compartments.

Q. Can you give us some estimate of the amount of labor that was used to construct it?

A. Around four. We had a hard time draining that place there because it is water.

Q. You mean when you started digging you found water?

A. Because that place is sea level. We had three boys taking the sand out. We dig it by hand, not mechanical way.

Q. Do you remember how long it took you to install it?

A. It took us more than one week because of the water.

Q. You don't recall how long?

A. No, I don't recall how long exactly.

(Testimony of Albert B. Padua.)

Mr. Bohn: Now if your Honor please, we have a series of invoices for the——

The Court: Listen, I think we had better take a 15-minute recess at this time.

(The court recessed at 3:10, February 17, 1955, and reconvened at 3:30, February 17, 1955.)

Q. (By Mr. Bohn): Now, Albert, before the court adjourned [100] we were, I think, down to the materials which had been purchased elsewhere. I will show you a list of materials which you furnished and attached as explanation for Item II and rather than to go over them one by one I would like to show this witness the list and ask him if all these materials went in that building.

Mr. Phelan: I must object to that. That doesn't prove anything.

The Court: You are still referring to materials used?

Mr. Bohn: That is correct, your Honor. In other words, some of these materials were taken from Pacific Enterprise, the balance were all from outside sources. We have invoices. I simply want to ask this witness whether these materials went into this job.

The Court: The objection will be overruled.

Q. (By Mr. Bohn): Albert, will you examine this list of materials and tell us if all these materials went into construction down there?

(Testimony of Albert B. Padua.)

The Court: Now what list are you talking about?

Mr. Bohn: It is Schedule A. In other words it refers to "PCC invoices (See Schedule A attached)" and I then turned to Schedule A. It starts out——

The Court: Are you putting in the invoices?

Mr. Bohn: I am going to do so, yes, your Honor. In fact Schedule A, B, C, and D are all in the same condition. We have invoices for all of [101] them.

The Court: That's beginning with lacquer?

Mr. Bohn: No, beginning with Bulletin red paint, Indian red, Trulike white and so on. Schedules B and C are on the last page; Schedule A is on the third from the last.

The Court: Now you have something intervening there that I don't.

Mr. Bohn: Well, the intervening page is the additional charges—those are for additional subsistence and that sort of thing and therefore, your Honor, we will make no further reference to the intervening page.

The Court: Very well.

Q. (By Mr. Bohn): Will you check that list and see if all that material went into the building?

A. (Nods head.)

Q. That all went into the building?

A. (Nods head.)

Q. Now was all that material charged to Pacific Enterprises?

(Testimony of Albert B. Padua.)

Mr. Phelan: I object to that because this man is not an accountant. There is no foundation laid for him to answer such a question.

Mr. Bohn: I withdraw the question.

The Court: I think the important thing is whether he bought it.

Mr. Bohn: I beg your pardon. [102]

Q. (By Mr. Bohn): Did you buy the material?

A. Not myself but my assistant foreman.

Q. In any event it went into the building?

A. Yes.

Q. Now I show you what is described here as Schedule B containing a list of materials, ballcock lacquer, bushing and so forth and ask you if all that material went into the building?

A. I don't know what is this "slimline."

Q. What is your question?

A. I don't know what's that "slimline."

Q. Find the item for me on here. Oh, you are talking now about Schedule C. As far as Schedule B is concerned—this group ending down here totaling $52.65—— A. Yes.

Q. Did you or your assistant order all that material? A. Which one?

Q. All this material you just glanced at.

A. Yea.

Q. Where was that ordered from, do you recall? Was that ordered from Pedro's?

A. PCC and Calvo. The plumbing equipment was ordered by Calvo.

Q. I will now ask you to glance at Schedule C

(Testimony of Albert B. Padua.)

and ask you if all that material went in the building?

A. I don't understand that slimline. [103]

Q. You do not understand what slimline means?

A. (Shakes head.)

Q. Now I will ask you to look at Schedule D, which is three loads of crushed coral, and ask you if that went into the Dairy Queen area?

A. Yes.

Q. Now, how many loads of crushed coral altogether went into that area?

A. In the building or around it?

Q. Well, how much crushed coral went in the building or around the building during the time you were construction foreman? How much altogether?

A. I could not tell you how much altogether.

Q. Well, how much went into building the foundation?

A. Well, I think we had six loads or coral and three loads of sand.

Q. Schedule D only refers to three coral and there is apparently no sand. Now returning to—there is an item here for 95 bags of cement. Did that much cement go into the construction of that building?

A. 95 bags? I doubt it with that building. I think we only used around 50 bags.

Q. About 50 bags?

A. 50 or 60 bags, something like that.

(Testimony of Albert B. Padua.)

Q. So if 95 bags were delivered the excess was taken back, [104] is that correct?

A. That is what I don't know.

Mr. Phelan: I don't find that item at all in the cost of the additional store.

The Court: Whereabouts is this?

Mr. Bohn: Going back to the main item of materials used there is an item there for 95 bags of cement. The fifth page from the back. It is in that general heading "material used." It's that major recap that I was working from earlier, your Honor.

The Court: The last item?

Mr. Bohn: Yes, your Honor.

Q. (By Mr. Bohn): You are stating that was your best judgment as to how much cement was used there? A. 60 bags.

Q. It could not have been 95 bags, is that correct? A. No.

Q. And what was the cost of cement about that time? A. It's $2.75, I think.

Q. $2.75 a bag? A. Yes.

Mr. Bohn: If your Honor please, as to that item we are reducing our request to 60 bags.

The Court: How are you computing that?

Mr. Bohn: By estimate.

The Court: You are relying entirely on his estimate? [105]

Mr. Bohn: Well, I don't know any other source to find it.

Q. (By Mr. Bohn): What concrete work did you do at the building?

(Testimony of Albert B. Padua.)

A. The whole foundation.

Q. How about the floor?

A. Yes, the floor.

Mr. Phelan: I don't think we have any competent evidence in as to this building at all at this stage of the proceedings.

The Court: Well, it is extremely difficult to find, ostensibly, 95 bags charged and accounted for and then have evidence that they couldn't possibly have been used.

Mr. Bohn: I don't know how the original charged item was arrived at but in checking this list with this man during recess he said it was obviously in error; it could not have been 95 bags. I have no further questions of this witness.

Cross-Examination

By Mr. Phelan:

Q. As to this material you have been testifying to have you got any personal knowledge of its cost, of any of these items?

A. Yes, I have personal knowledge.

Q. Of all of them?

A. Most of them, not all of them.

Q. Do you recall as of this date what the price was of any particular item here? [106]

A. Well, like the lumber—it's 17 cents per board foot.

Q. Is that today's price?

A. No, it is when we were constructing.

Q. How much of this lumber was used?

(Testimony of Albert B. Padua.)

A. I don't know exactly how many board feet we used.

Q. Was some used? A. All of it was used.

Q. Isn't it a fact that 17 cents a board foot was the price of new lumber at that time?

A. That was new lumber we bought from PCC.

Q. I thought you said you used used materials in the building?

A. I never said used materials in the building.

Q. Did you use any material in that building that had been used before?

A. That had been used?

Q. Yes. A. No.

Q. It was made out of brand new material, the entire building?

A. It is not exactly brand new.

Q. What was it then?

A. Like the door—it has never been used because we bought it from surplus. It had been lying there six months. It is not brand new yet. [107]

Q. You bought your surplus where?

A. That was in this Guam Department lumber-yard deal with Mr. Siciliano.

Q. Isn't it a fact that they bought and dismantled surplus buildings at the Army?

A. They never dismantled. It was new surplus.

Q. It was not——

A. Any material—it was not surplus building—any material can be surplus material.

(Testimony of Albert B. Padua.)

Mr. Phelan: I think the court remembers that lawsuit.

The Court: I don't.

Mr. Phelan: It was in this court.

The Court: It never came to trial.

Mr. Phelan: Never came to trial? I thought a judgment was entered in that suit. I was not a party to it but I remember it being filed.

The Court: No.

Q. (By Mr. Phelan): Now you said you had no plan for the snack bar, no blueprint to build by?

A. For what building?

Q. For the snack bar.

A. Which snack bar?

Q. The one down at Anigua.

A. There isn't any snack bar.

Q. What did you build there? [108]

A. Well, according to Mr. Siciliano when he directed us to build it, it is for selling popcorn, like that.

Q. What did you build down there?

A. A building.

Q. Did you have blueprints for that?

A. I had blueprints of the original Dairy Queen building to be followed.

Q. Do you know the size of the original Dairy Queen building?

A. I don't remember it now.

Q. You know its shape?

A. I know its shape.

Q. What is the shape?

(Testimony of Albert B. Padua.)

A. Well, it's somewhat—in the front——

Q. Do you know the shape of it?

A. I don't know.

Q. But you have seen it?

A. I have no description of the shape. I have seen it.

Q. You don't know whether it is circular, triangular or oblong?

A. I can describe a building which is square but I don't know how to describe it rounded on the end.

Q. On the building you built how would you describe it?

A. Well, it wasn't exactly the same, the new building—it was attached and that is why right on the end of the building [109] it was not followed.

Q. So you built that building from the plans for the original Dairy Queen? A. Yes, sir.

Q. You had no independent plans?

A. Yea, you could not just follow the plan if the alterations call for it.

Q. How did you know what the alterations would be if you had no plan?

A. Because the alteration was it was to be attached to the old building. It was to be on the right side of the building. It wouldn't be the same. We followed the plan except for roofing on the right because it is attached to the old building.

Q. Has the new building got the same shape as the old building?

A. The same shape but not the same length.

(Testimony of Albert B. Padua.)

Q. Are the partitions inside in the same place?

A. It's almost the same partition.

Q. Is the new building as deep as the old building? A. What do you mean by "deep"?

Q. Front and back.

A. Well, I think we had—the old building was wider in the front—in the floor space, I mean to say—than the new one we have.

Q. You built the new one identical to the old one? [110] A. It's identical.

Q. And from the same set of plans?

A. (Nods head.)

Q. Now did you, when you built that, provide electrical and plumbing outlets or outlets for the freezers used in the Dairy Queen business?

A. We put an outlet there but I don't know what it was for.

Q. Where did you put the outlet?

A. Right in the partition; there is an outlet in the partition but we use it for a fan.

Q. For a fan? A. Yes.

Q. What current does it use? A. 110.

Q. Did you provide for water for cooling the machines the same as in the original Dairy Queen building? A. We didn't provide that.

Q. Did you provide any floor drains?

A. Yea, there is a floor drain.

Q. Now how long did it take you to build this building?

A. Well, I don't know exactly how long we built it.

(Testimony of Albert B. Padua.)

Q. Approximately?

A. I think it's a month or more.

Q. And you supervised it? [111]

A. Yes, sir.

Q. You were down there every day? What was the day that you started that building?

A. Oh, I don't exactly remember what day.

Q. What year was it?

A. I might be wrong, maybe. I could not assure you what year; I forget.

Q. What month?

A. Not even the month; I don't recall.

Q. You don't even know the month. Now how long after you were told to start that building was it before you started to work?

A. Oh, we started right away.

Q. The same day?

A. Yes, sir, we started right away.

Q. Who told you to? A. Mr. Siciliano.

Q. What did he say to you?

A. Well, he give me the plan. He told me to follow the plan the same with the glass we had in front in the old Dairy Queen and he showed me some alterations in the plan. The partition should be a little closer, like that.

Q. And what did he say the building was to be?

A. I think he told me he was going to sell popcorn there if I remember. [112]

Q. Did he provide any electrical wiring to hook up a popcorn machine?

A. Yes, we had an outlet there.

(Testimony of Albert B. Padua.)

Q. How many outlets did you put in there?

A. We put four outlets.

Q. Did you ever complete the building?

A. We completed it except putting the glass on.

Q. Was that all that remained to be done?

A. Yes, sir.

Q. The plumbing was in?

A. The plumbing was in.

Q. All the wiring was in?

A. The wiring was in.

Q. Now what was that wiring in that extension? Was it 110 or 220? 110 or 220? Which one was it? What kind of power did you put in the new building? A. The new building?

Q. Yes. A. It was 110.

Q. Now, was Mr. Siciliano still on Guam when you started construction?

A. He was still here.

Q. He was still here. Now you said this morning you had used some acoustic tile at the Dairy Queen? A. Yes. [113]

What other material down at the Dairy Queen did you use?

A. That is the only material because he wanted it to be the same as the old Dairy Queen—the acoustic tile.

Q. How old was the old Dairy Queen at that time? A. Not so old.

Q. You didn't use any plywood that was down there on the jobsite? A. No.

Q. Any Cellotex? A. No Cellotex.

(Testimony of Albert B. Padua.)

Q. There were no materials down there except acoustic tile? How much acoustic tile?

A. How much acoustic tile?

Q. Yes.

A. I don't know the price because we were not the one who bought it.

Q. How much tile? A. I don't remember.

Q. How big an area did you cover with this tile?

A. I think it's 14 by—I don't remember.

Q. You don't remember yet you could look a little while ago at a list almost two pages long of items going into that building and you could remember each one of those was issued?

A. That is different.

Q. You just remembered; you never forget; but a period of [114] months you could forget. When was the last time you saw that list?

A. Which one? Of Dairy Queen?

Q. Yes. A. Just now.

Q. Was that the first time?

A. Not the first time.

Q. When was the last time?

A. They were reading it to me when we had a recess.

Q. That is the first time you saw the list was at the recess? A. Yes.

Q. And you are positive every item on that list went into the building? A. Yes, sir.

Q. Yet you don't know how much an area of the building was covered with acoustic tile?

A. That's different.

(Testimony of Albert B. Padua.)

Q. If at recess I had showed you how much was covered with acoustic tile could you now testify what it was? A. I could not assure you.

Q. But after showing you a list this afternoon at recess, you are positive of what the building was constructed? A. Yea.

Q. Now you said the building was constructed out of reefer [115] panels because it was going to be air conditioned. Isn't it a fact the front of the building was going to be completely glass?

A. Yes, sir.

Q. Isn't it a fact that the double doors in the back were going to be screen doors? A. It is.

Q. Isn't it a fact that up above you put louvers up above and around the building so it would be easier to convert to air conditioning? You did put louvers in?

A. I did just in case it wasn't air conditioned.

The Court: Do I understand your answer to be you didn't put the reefer panels in because it was going to be air conditioned but you put them in there in case it ever should be air conditioned?

A. Just in case, sir.

Q. (By Mr. Phelan): Did anybody ever tell you it would be air conditioned?

A. Nobody ever told me.

Q. Did you ever make any preparations so that air conditioning could be installed in the building?

A. It was easy—no preparation, but it is easier to make.

Q. It is easy to cut a hole in the steel?

(Testimony of Albert B. Padua.)

A. With the panels we could do it—eliminate the louvers.

Q. Where did you put the panels?

A. In the back. [116]

Q. Didn't you just tell us that it was the front that was going to be air conditioned because there was an air-tight door there? What part of the building was going to be air conditioned?

A. The front part or back part; it doesn't matter—as long as you open the door, the front part is air conditioned.

Q. You are positive that all of this material was used in the building? Let me ask you how you explain this one entry: It says here, "Quantity, 1; unit, pieces; 2 x 12 x 14 wood; unit price, $.18," and they have a price of $5.04 on that, which obviously indicates there is more than one piece. Now which is correct? A. I will tell you the place we put it.

Q. Please do.

A. We put it in the ceiling of the front glass, the front extension, top ceiling.

Q. I thought you said you didn't have any glass?

A. It is preparation for glass.

Q. How many pieces did you use?

A. 1, 2, 3, 4—we even had it in the yard—we used 5 of it.

Q. When you went over this list you didn't notice the fact that only one showed on the list?

A. What's that?

Q. When you went over that list you didn't notice the fact [117] that only one showed on the list?

(Testimony of Albert B. Padua.)

You said you used five but only one is on the list.

A. I just told you—we had some and we used it.

Q. Do you know whether that was bought or not when it came down?

A. Well, it was bought for it.

Q. How do you know?

A. Well, Mr. Siciliano——

Q. You took it for granted he bought it?

A. Yea, I was working with him and I was the one who took it.

Q. Did you see him buy it?

A. That is what he told me; I wouldn't just be stealing it.

Q. Now, how much of this other testimony you have given me today is based upon what somebody told you?

A. Well, he is my boss. What he tells me is what I am going to do, what I believe.

Mr. Phelan: That is right—what he says is so. I have no further questions if it please the court.

Mr. Bohn: I request the court for permission to ask this witness some questions which are not proper redirect examination. They are involving labor in this building, which I neglected to ask when I had him under direct examination before.

The Court: Go ahead and ask him.

Mr. Phelan: I don't see that it has any value, but if you [118] want to waste the time, go ahead.

(Testimony of Albert B. Padua.)

Redirect Examination

By Mr. Bohn:

Q. Albert, do you remember the names of the boys that you used down there as employees and workmen? A. I remember some of the boys.

Q. Did you use Simeon Bandong, B-a-n-d-o-n-g?

A. There is some more there.

Q. Well, did you use him? A. Yea.

The Court: Are you going over each of the workmen individually?

Mr. Bohn: Well, the probability is, we are put to proof. I can show him the list and ask him if each one of these men worked there.

Mr. Phelan: That is not competent proof. Your records are the proof.

The Court: Give him the list and ask him if those men worked on the job.

Q. (By Mr. Bohn): Did those men work on the job the period set forth opposite their names?

The Court: Well, now, he can't testify as to the periods, obviously. This happened back in 1952. Presumably you have time records showing the periods they worked.

Mr. Bohn: Well, we can produce secondary evidence. I [119] don't think our time records get to each day as to each particular man.

The Court: You can't expect this man who testified he had a crew of 14 working on the building—you wouldn't expect him to remember back to 1952, the exact hours worked by each man.

(Testimony of Albert B. Padua.)

Q. (By Mr. Bohn): Well, I should perhaps put the question another way and that is this: Was this a continuous job that you put a certain crew on from the day you started and you kept those men on until you finished?

A. Oh, yes, it is a continuous job.

Q. This is not a situation where you had men on a few hours and then shipped them to another job, is that correct? A. No.

Q. And how long did this job take, approximately? A. More than a month.

Q. About how much more than a month?

A. I don't remember, but I know it's more than a month.

Mr. Bohn: I have no further questions.

Recross-Examination

By Mr. Phelan:

Q. Did you work down there at all yourself?

A. Yes, sir.

Q. How many men worked?

A. Sometimes we had seven.

Q. Do you remember how many men worked there on any one [120] day? A. No.

Mr. Phelan: I have no further questions.

Mr. Bohn: None—no further questions.

Examination

By the Court:

Q. Now, tell me this: You built the addition on the Dairy Queen? A. Yes, sir, your Honor.

(Testimony of Albert B. Padua.)

Q. How would you get from the front of Dairy Queen to the addition if you were in front, as you described the round place? A. Yes, sir.

Q. How would I get from there into the addition? A. I don't get it.

Q. If I wanted to go from that round place—in other words, where the machinery is and where the ice cream is sold—over to the addition, how would I get there?

A. We had a back door in the new building.

Q. I would have to go out the back door of the Dairy Queen?

A. Yes, and the back door of the addition.

Q. And I would have to come in by the back door of the addition? A. Yes.

Q. There was no way for anybody to go from the old to the addition on Dairy Queen except to go out and in the other door?

A. Except to go in the other door. [121]

Q. No provision was made except to go outside. Was that the plans that were given you?

A. The original plans of Dairy Queen—there is a door on the side of that, your Honor.

Q. I think that is correct but we are talking about one operation here. In other words, there was no way—now follow me just a moment—you have the sales section of the ice cream place; it stands out from the other building—you built your addition so that it was just one big building in back and then the sales place for ice cream. Now if you were selling sandwiches in the addition and selling

(Testimony of Albert B. Padua.)

ice cream in the Dairy Queen one man couldn't sell you ice cream one place and sell you a sandwich in the other place without going out the back door and coming in the other door, could he?

A. The reason why we didn't put any door between the two buildings, your Honor, because the shelf is more important than opening a door there because the door of the new building is very near to the old building so they didn't advise putting a door there between the buildings.

Q. So you didn't intend anyone should go from the Dairy Queen into the new building?

A. No.

The Court: That is all I have. Thank you.

Mr. Bohn: No further questions. Now, on our next witness, if your Honor please, we will recall Mr. Diza. [122]

The Court: Very well.

MR. ERNESTO O. DIZA

previously called as a witness by the plaintiff, was recalled as a witness by the plaintiff and having been previously sworn, testified as follows:

Direct Examination
(Continued)

By Mr. Bohn:

Q. Now, Mr. Diza, when you were on the stand before we were asking you about a series of questions and you were asked by the court to get these vouchers and so forth in order. If your Honor

(Testimony of Ernesto O. Diza.)

please, I am going to start this series of questions on page 2, beginning with the item for maintenance, No. IX, running down through those supplies. Now, you are the bookkeeper for Pacific Enterprises, is that correct? A. That is right.

Q. There is attached to this a claim against American Pacific Dairy Products of an item for one electrician at $1.82 an hour for 70 hours. Can you find any timecards for that individual?

A. This is the timecard for the electrician.

Mr. Phelan: You said you are starting on page 2. Now, what page do you actually mean? Actually the third page, I think. It is page 3, is that correct?

The Court: These pages are not even numbered, are they?

Mr. Bohn: No; the pages are not numbered. Page 1 is—— [123]

The Court: This is actually numbered page 2.

Mr. Bohn: Oh, yes, at the top.

Q. (By Mr. Bohn): The timecards which you have just identified are described as electrician's time record for services rendered to Dairy Queen?

Mr. Phelan: Wait a minute before you read those. Are you going to offer those in?

Mr. Bohn: Yes.

Mr. Phelan: I object.

Mr. Bohn: I haven't made the offer yet.

Mr. Phelan: I want to stop you from reading them.

The Court: What is this?

(Testimony of Ernesto O. Diza.)

Mr. Phelan: I am objecting to these timecards. They don't mean anything. They are not proper timecards. This man didn't even look. He just said, "This is the timecard of an electrician."

Mr. Bohn: Now, just a moment. You haven't given me the opportunity to properly identify what I am going to offer into evidence. I think I am entitled to the courtesy of an offer. Should the judge determine the offer is improper, the objection will be sustained.

The Court: That is correct. Continue.

Q. (By Mr. Bohn): I show you a series of pages each headed "Electrician's Time Record." What does the "D.Q." stand for? [124]

A. Dairy Queen.

Q. And each contains a date and the number of hours, is that correct? A. That is right, sir.

Q. And were these kept by you?

A. That is right, sir.

Mr. Bohn: I now offer these in evidence as plaintiff's exhibit next in order.

Mr. Phelan: I object to them.

The Court: Let me see the exhibits and then we can make inquiry as to whether they were posted to the debit account of the Dairy Queen. Did you ever post these anywhere?

A. I posted the statements, your Honor.

The Court: Did you ever post them to an account due?

A. No, your Honor.

The Court: You mean Pacific Enterprises paid

(Testimony of Ernesto O. Diza.)

for these but you never showed them as being charged to Dairy Queen on your books?

A. No, your Honor.

The Court: Why not?

A. Well, I have no instructions to charge Dairy Queen but I keep the time.

The Court: Well, you didn't keep this time, did you?

A. Well, the electrician give the time record every time he go to Dairy Queen. [125]

The Court: This was a time sheet turned in by the electrician?

A. Yes, sir.

The Court: I think this is the plaintiff's first exhibit.

Mr. Bohn: I am sorry; I was confused with the other case.

Q. (By Mr. Bohn): I show you what purports to be timecards of a similar nature for "Reefer Mechanic's Time Record for Services Rendered to D.Q." I show you these and ask you if you recognize these?

A. These are the reefer mechanic's time record.

Q. Whose signature is on the bottom of these?

A. C. M. Albanez and V. Gatdul.

Q. Those are the men involved?

A. That is right, sir.

Mr. Bohn: I now offer these in evidence as Plaintiff's Exhibit No. 2.

Mr. Phelan: I object to these—the same objec-

(Testimony of Ernesto O. Diza.)

tion. I don't think they are timecards at all, anyhow.

The Court: Time slips turned in by the individual and tied in with the statement of Mr. Meggo whose claim is that he knew that the work was done.

Mr. Phelan: Well, I am curious if they are timecards turned in by the individual why there are some blank ones stapled in the middle of this group, too.

The Court: Well, you will have the opportunity to examine [126] them. They will be received. Proceed.

Q. (By Mr. Bohn): Now, turning to the item, "Supplies issued to Dairy Queen from Pacific Enterprises own stock," I will ask first of all for you to find for me the item——

Mr. Phelan: Well, now, what is this you have just introduced? You have got reefer mechanics "A" and reefer mechanics "B." What do you mean by that?

Mr. Bohn: Well, apparently there is one heading "mechanics" and two mechanics and the time for both of them was kept on the same cards that we have just introduced.

Mr. Phelan: Well, did both of these men make the same pay?

A. No, sir.

Q. (By Mr. Bohn): Mr. Albanez, the first mechanic—how much does he make?

A. $300 a month at Pacific Enterprises.

(Testimony of Ernesto O. Diza.)

Q. And how much is that an hour?

The Court: Let me see that Exhibit 2.

Q. (By Mr. Bohn): What does the other mechanic make?

A. I think he makes $300 a month.

Q. Plus subsistence? A. (Nods head.)

The Court: Now, this Plaintiff's Exhibit 2, is this not inadequate to proof the time put in by an hourly workman?

Mr. Bohn: Your Honor, I didn't hear the balance of your [127] statement because of aircraft.

The Court: You have what appears to be October, '52, and then you have 6, 10, 14, 16, 22 and 30 and opposite you have 3, 2, 4, 7, 12 and 7; total 35 hours, and then signed, ostensibly by someone. Well, an hourly worker doesn't keep his time on this kind of basis, nor do we know whose this second signature is.

A. It is Solina, John A.

The Court: Who is he?

A. Well, he is employed by Pacific Enterprises and he went home already.

The Court: Why is his signature on here?

A. Well, just to certify that he worked there as a reefer mechanic.

The Court: How does he know whether he worked there?

A. I beg your pardon?

The Court: How does he know whether he worked there or not?

(Testimony of Ernesto O. Diza.)

A. He worked there because he signed it and the reefer mechanic is here also on Guam today.

The Court: Well, I am going to accept this but I certainly do not think that that is the way to prove the work performed by an hourly worker.

Mr. Bohn: May I examine that?

The Court: Certainly. An hourly worker must turn in his time each day. [128]

Mr. Bohn: I don't think there is any question about that. I want to ask a few more qualifying questions. May I now?

Q. (By Mr. Bohn): Each of these slips contains at the top what purports to be the month. The first one says October. Immediately after there is a "6." Is that October 6? A. Yes.

Q. And the total opposite there is the hours—3—does that mean he worked three hours that day?

A. Yes; that is right, sir.

Q. Now, how did that get there? Who put it there? A. Mr. Albanez.

Q. He put it there himself, is that correct?

A. Yes; that is right, sir.

Q. Is the same testimony true on each of these hours and dates? A. That is right, sir.

Q. And you required each of the men to sign these as charges, is that correct?

A. That is right, sir.

Q. And one of the mechanics is still on the island available? A. That is right, sir.

Q. Now, Mr. Diza, under supplies issued to Dairy Queen from Pacific Enterprises own stock

(Testimony of Ernesto O. Diza.)

we have an item for 2 gallons imitation vanilla flavoring, $1.43 a gallon. Do you find any [129] voucher or written evidence of the existence of that amount? A. This is.

Q. Now, I show you what is dated 8/2/52 and purports to be a delivery slip to the Dairy Queen containing a good many items. Two of the items contain after them "P.E.I." and I will ask you what those notations mean?

A. Pacific Enterprises, Inc.

Q. And what are those two items?

A. This is the two gallons of imitation vanilla and four bottles of nuts.

The Court: Now, I don't understand this. These are among a number of other items?

Mr. Bohn: I was just going to ask some other questions. This is a list of many items and I was going to ask him—the other items are matters delivered to Dairy Queen but from the Dairy Queen's own stock. They are all contained on the same common slip. That is why I am qualifying these.

The Court: You mean Pacific Enterprises mingled their stuff with Dairy Queen's?

Mr. Bohn: Not mingled. Where it came from was marked Pacific Enterprises separately.

The Court: You made no separate charge for what you sold to Dairy Queen?

Mr. Bohn: They are contained on one slip. It is not a charge slip; it is a delivery slip. [130]

Mr. Phelan: How can you construe that to be an invoice especially when the same man is keeping

(Testimony of Ernesto O. Diza.)

the books and it is out of the same warehouse on the same tally out? I can't see it.

Mr. Bohn: Well, I appreciate the fact that you can't, Mr. Phelan, but if it is noted——

The Court: Well, now, Mr. Bohn, what kind of business are we talking about? You are here suing on behalf of the corporation for what you furnished. Now you are offering evidence of what it delivered, part of which was already owned by the defendant.

Mr. Bohn: That is no question whatever——

The Court: Do you have any charges made in proper form for these deliveries to the defendant and delivered to the bookkeeper to be posted as charges against the defendant?

Mr. Bohn: If you mean do we have any entries in proper form, there are separate slips. I will ask this witness: Do you have any separate charge slips?

The Court: Yes; charge slips is what we are interested in.

Mr. Bohn: In my theory, after proving delivery, it would then allow them the reasonable value.

The Court: If you have your charge slips. You can show the charge slip and then that the item referred to on that was delivered.

Q. (By Mr. Bohn): Do you have any charge slips?

A. No, sir; these are all delivery slips. [131]

The Court: In other words, the only control you have is the delivery slips, is that right?

A. That is right, your Honor.

(Testimony of Ernesto O. Diza.)

The Court: And you delivered stuff that belonged to Dairy Queen and you delivered stuff that belonged to Pacific Enterprises?

A. That is right.

The Court: And if it belonged to Pacific Enterprises you made a note "Pacific Enterprises" on the slip?

A. That is right.

The Court: And that is why you know that Dairy Queen owed Pacific Enterprises?

A. That is right.

The Court: And you didn't post these to any book?

A. No, your Honor.

The Court: Well, I think I have gone about as far as I can in accepting that kind of proof in the creation of a book obligation.

Mr. Bohn: Well, I can hardly contend that it is the proper way to keep books. I am only seeking to prove the fact of delivery and requesting the reasonable value. I cannot successfully contend that it is the proper way to keep books.

The Court: I think you had better forget about it if it is represented by that kind of a transaction because, obviously, if the plaintiff in this case intermingled its affairs to that [132] extent, it can't expect the court to accept this type of evidence of anything. All that is required to justify that is to take a slip of any kind and put "P.E.I." after it and it would be a charge against the Dairy Queen.

Mr. Bohn: As I say, I cannot successfully con-

(Testimony of Ernesto O. Diza.)

tend that this is the way to handle the books, your Honor.

The Court: I think that is right and, furthermore, I wouldn't try it.

Mr. Bohn: Very well, with your Honor's permission I will abandon the line of questioning on that particular subject.

Q. (By Mr. Bohn): Now, Henry, you have some other vouchers there. I am turning now to the items referred to in Schedule A, if your Honor please. The previous testimony has been that the material went into the building. That Schedule A is the third from the last page. Now, would you examine Schedule A, please, so that you may identify what I am talking about? Where was this material purchased?

A. We purchased from PCC, some from Pedro, some from Marianas Sports and some from Guam Amusement Company.

Q. Now, is that limited to Schedule A or Schedules A, B, C and D?

A. Yes; that is three schedules.

Q. Let me put it this way: Were the items on Schedule A all purchased from one supplier?

A. You can check with this figure. [133]

Mr. Bohn: Well, apparently items from Schedules A, B and C were all purchased from different suppliers. I will therefore ask you to identify—to glance at Schedules B and C and I will ask you if you have vouchers for that material as well?

A. (Nods head.)

(Testimony of Ernesto O. Diza.)

Q. (By Mr. Bohn): These are the vouchers?

A. That is right.

Q. Now, do you know what a slimline is? Can you find a voucher for a slimline? Try to keep those in order if you can.

The Court: How much is the amount?

Mr. Bohn: The item is $39.50.

Q. (By Mr. Bohn): Do you know what a slimline is? A. No; I don't know.

Mr. Bohn: I think we will abandon this.

The Court: Well, I don't see any objection to putting it in.

Q. (By Mr. Bohn): All right, now, you have vouchers for all of these items, is that correct?

A. That is correct, sir.

Mr. Bohn: Well, I will offer them all in evidence.

The Court: Those are vouchers of your purchases supporting your Schedules A, B, C and D?

Mr. Bohn: That is correct; they are the purchases from outside sources. [134]

The Court: Other sources. Now, are you going to put on evidence to show the value of your service, the value of the used parts and so forth?

Mr. Bohn: I have presented all of the evidence.

The Court: That you have purchased?

Mr. Bohn: I have no further evidence on that, your Honor. I can put Mr. Siciliano on.

The Court: How do you expect to prove a reasonable value of a reefer plant, for example?

(Testimony of Ernesto O. Diza.)

Mr. Bohn: I can have Mr. Siciliano testify as to that.

The Court: You have a used deep freeze.

Mr. Bohn: I can ask him where those figures came from. I can put Mr. Siciliano back on.

The Court: Maybe Henry knows where he got up the figures if he made up that report.

Q. (By Mr. Bohn): Where did these figures come from? I am talking about a ¾ h.p. Westinghouse motor. A. That is on——

Mr. Phelan: I object to any of these coming into evidence, your Honor. They have no more probative value than those other ones.

Mr. Bohn: I suggest you show them to the court and let the court examine them.

The Court: They tie in with the testimony here that the material was used. [135]

Mr. Phelan: I think if the court would look at them, the court might——

The Court: I will receive these as material going into the building.

Mr. Phelan: They could equally have gone into any other building.

The Court: I don't think it makes too much difference. We are going to have to generalize as to the value of that building, anyhow. I don't think specific costs are going to mean very much to us.

Mr. Phelan: I don't think they mean anything.

Mr. Bohn: I offer those in evidence.

The Court: Yes; they will be received as Plaintiff's Exhibit No. 3.

(Testimony of Ernesto O. Diza.)

Q. (By Mr. Bohn): You say the ¾ h.p. motor was included in the outside purchases, is that correct? A. That is correct.

Q. Now, you have $101 for a hot fudge heater?

A. That is right, sir.

Q. Where was it purchased, do you remember?

A. From the States.

Q. Was it purchased by Pacific Enterprises?

A. That is right, sir.

Q. When was this purchased, Henry?

A. Oh, I would say way back from Harmon Field. [136]

The Court: Was it used at Harmon Field? Was it used?

A. Yes; used.

The Court: And you charged them at the invoice price?

A. That is right, sir.

The Court: Did you do that with everything else whenever you had used equipment charged them or did you charge them a new price?

A. No; same price, your Honor, same invoice price.

The Court: It was the new price, wasn't it?

A. Yea.

Q. (By Mr. Bohn): Now, a Universal condenser—you have an item of $25. Where did you get that $25 item? A. Universal condenser?

Q. Are all these prices invoice prices?

A. I presume they are, Mr. Bohn.

(Testimony of Ernesto O. Diza.)

The Court: When did you set these prices, Henry?

A. I go by the invoice.

The Court: When did you do it?

A. August, 1953, your Honor.

The Court: You just took the item and you figured out what its value was, its new value?

A. From the invoice.

The Court: From your invoice?

A. That is right.

Q. (By Mr. Bohn): You did not seek to value them in their [137] condition at the time they were turned over, is that correct?

A. I beg your pardon?

Q. In other words, you used your cost on all these items? A. That is right.

Mr. Bohn: I have no further questions of this witness.

Mr. Phelan: I have a couple.

Cross-Examination

By Mr. Phelan:

Q. Henry, you have the timecards of these electricians. What do they get paid an hour, do you know? A. Well, they get paid by the month.

Q. What is the normal work week?

A. Eight hours.

Q. Eight hours a day? A. That is right.

Q. And how many days a week?

A. Six days a week.

(Testimony of Ernesto O. Diza.)

Q. 48 hours a week? A. That is right.

Q. What does your first man get paid, your electrician?

A. They get paid by the month, $250.

Q. He received $250 a month?

A. That is right.

Q. How about the reefer mechanic?

A. The reefer man is $300. [138]

Q. What did the men who worked—I believe I have the names here—on the building, that addition down there, get? There was Simeon Bandong, Mariano Vinoyo, Celestino Vinoya and E. Sibonga. What did they get a month? I could show you these men—what was their rate of pay per month?

A. Mr. Simeon Bandong get $125 a month and Mr. Vinoya $100 a month. Mr. E. Sibonga received $125 a month, the same as Mr. Bandong.

Q. Now, which man was the $100-a-month man?

A. This man.

Q. Now, the men who did this work presented to you their timecards once a week or when?

A. No; they give it to Mr. Gregorio, I think, sir.

Q. Who is Gregorio?

A. He is the clerk in the office. I don't know if they present any timecard or maybe the foreman submitted the statement of the days they worked and the hours they worked.

Q. And this clerk puts them on these slips?

A. (Nods head.)

Q. Do these slips go out of the office or are they kept in it?

(Testimony of Ernesto O. Diza.)

A. Well, I say, Mr. Phelan, when they are off they just go to the clerk and tell him.

Mr. Phelan: I don't think there is any slip here.

A. That is the electrician and reefer [139] mechanic.

Q. (By Mr. Phelan): Oh, on these other men there is no slip? A. No.

Q. The electrician and reefer mechanic—do they turn a slip in daily?

A. I don't know exactly but Gregorio could tell how they give the timecard to him.

Q. So you don't know whether or not he makes the entry on what they tell him or he makes the entries from the timecards? A. No, sir.

Q. Now, there was no timekeeper on the job, I take it, then? No man on the job with the assigned duty of keeping track?

A. You mean on the construction?

Q. Or if you were doing the job, would you have a man on the job to keep track of how many hours each man worked? A. Yes.

Q. Did you have one at the Dairy Queen?

A. Well, the Dairy Queen—with regard to the construction we just tell the clerk they worked that day and that is it.

Q. So you took their word for it?

A. Yes; that is right.

Q. And you told the court that on equipment and materials you used the invoice prices?

A. That is right, sir.

Q. No matter when that invoice was dated? [140]

(Testimony of Ernesto O. Diza.)

A. That is right, sir.

Q. Now, for instance, on this hot fudge heater you said it was used at Harmon Field?

A. That is right, sir.

Q. Do you remember how long ago it was bought? A. Oh, about 1948, sir.

Q. Five years later you used the invoice price?

A. That is right, sir.

Q. Had it been used?

A. After Harmon Field we did not use it anymore.

Q. Was it used at Harmon Field?

A. Yea.

Q. Now, I believe you identified one of those invoices as showing the issuance to Dairy Queen of two gallons imitation vanilla in November or October, 1952? A. That is right, sir.

Q. Isn't it a fact ten cases of vanilla valued at $6.50 a gallon were on invoice 14773, dated 11th day of July, 1952, and shipped out here in July of that year?

The Court: I don't see how you can expect him to remember that, Mr. Phelan.

Mr. Phelan: Well, he apparently remembers everything else. I don't see why I can't ask him that if the books show it.

The Court: Well, I think he is trying to the best of his ability to keep everything out except what he knows personally [141] and he would have to rely on his books.

(Testimony of Ernesto O. Diza.)

Q. (By Mr. Phelan): Can you tell that is so from the books?

A. In fact, I don't know that; we have the inventory records; that is the shipping documents.

Q. Do your books show such a shipment of that invoice for the Dairy Queen? A. Yes.

Q. Do you in your ledger or journal show the invoice number of these shipments?

A. Dairy Queen shipment, you mean?

Q. Yes.

A. No; I don't have a file for every shipment.

Q. Do you know that such a shipment was made?

A. Yes; I think so, sir.

Q. Well, why the next month would they be behind in vanilla?

The Court: He wouldn't be expected to know.

Mr. Phelan: Well, I am not too sure he was just a bookkeeper, your Honor. Apparently he was vice president.

The Court: Well, vice president in charge of bookkeeping.

Q. (By Mr. Phelan): Well, now, let me ask you a question. These books up there—this stuff was issued out. Do you show when this material was charged off as being used in the construction of Dairy Queen? Do you show when that was purchased? A. I beg your pardon, sir? [142]

Q. This addition down at the Dairy Queen?

A. Yes.

Q. And some maintenance work down there——

A. Yes.

(Testimony of Ernesto O. Diza.)

Q. You said you charged stuff off at invoice prices regardless when you bought it. Did you keep a record in your books as to when you bought these various items? A. Well, various invoices, sir.

Q. If you bought something in 1948 and sold it to Dairy Queen in 1953, would your books show that it was something you had from 1948?

A. Since 1948, you mean?

Q. Yes.

A. No; when we opened the Pacific Enterprises all the merchandise is on the books, on the inventory.

Q. Now, tell me this: Certain items depreciate, don't they? A. That is right, sir.

Q. You maintain a depreciation schedule?

A. That is right, sir.

Q. And you still were selling stuff to Dairy Queen at the original invoice price despite the fact that it was depreciated?

A. Well, that has to be approved by Mr. Thompson and Mr. Siciliano and if they agree with that figure, sir.

Q. Now, did you post these charges to Dairy Queen account?

Mr. Bohn: May I interrupt to ask that be more specific [143] as to which charges you are referring to?

Q. (By Mr. Phelan): Any of these charges pertaining to this suit, this present suit.

A. Well, the vouchers that I turned in to you like the construction materials we bought from PCC

(Testimony of Ernesto O. Diza.)

is charged on Pacific Enterprises books.

Q. They are reflected in Pacific Enterprises books? A. That is right, sir.

Q. All right; did you carry them on Dairy Queen books? A. No, sir.

Q. Did you carry in Pacific Enterprises books a charge showing that Dairy Queen owed that?

A. Well, I carried it as the building, the Dairy Queen building on my books, sir.

Q. The Dairy Queen building? You had an account for that building?

A. Yes; that is right.

Q. When did you start that account?

A. I started it in July, sir.

Q. July, but you didn't show that in Dairy Queen books? A. No, sir.

Q. Did you in Pacific Enterprises books show the partnership or Dairy Queen owed Pacific Enterprises?

A. No; it shows the Dairy Queen building.

Mr. Phelan: I have no other questions. [144]

Mr. Bohn: I have no further questions of this witness.

The Court: Very well. Henry, you may be excused.

Mr. Bohn: Now, your Honor, that concludes the plaintiff's case except I do have a reefer mechanic and electrician here if the court wishes to hear further testimony as regards maintenance.

The Court: Yes; before you conclude I would like to call Mr. Siciliano as the court's own witness.

MR. JOSEPH A. SICILIANO
previously called as a witness by the plaintiff was recalled as a witness by the court and, having been previously sworn, testified as follows:

Examination

By the Court:

Q. Mr. Siciliano, what did you pay for the reefer panels that you charged this company $50 apiece for?

A. I could give you an exact piece-by-piece price, but I have about $3,200 tied up in panels.

Q. And that averages what per panel?

A. I would have to figure it out. I have about $3,200 invested. I have about 500 panels. Some are very old and some are new.

Q. You think they average about $60 or $70?

A. No; I think more than that. Some are old ones—probably around $5,000, I would say around 4 to $5,000.

Q. So this estimate of $50 would be a guess?

A. No; that is what I could get for them. I have sold [145] some at that price. They are brand new. The old ones are cheaper, around $30.

Q. Now, tell me again how did you expect to operate the addition when you had no way of getting from one store to the other?

A. There was no reason to have the same boy. We didn't want to confuse the two places, the ice cream man with a man who was going to handle sandwiches and drinks.

(Testimony of Joseph A. Siciliano.)

Q. Now that is what I want to make clear. You proposed to operate a completely separate business?

A. Not entirely separate, no.

Q. What did it have in common besides the same wall?

A. Well, it wasn't completely separate. It was going to be a milk bar but the same boy that handled the ice cream wasn't going to handle the root beer and so forth. It was not going to be mixed up.

Q. Were you going to keep separate books?

A. Oh, no—as far as the books were concerned that would be separate; it would be separate, yes. It would absolutely have to be separate and the reason for the separation, too, is on account of the medics because of food and that stuff and we wanted to be careful on that end and that is why the building is absolutely separate.

Q. Now, is that good management, not being able to interchange your employees during slack periods? [146]

A. Well, it is all according to the way you look at it. It was the idea that it could operate on its own. Two boys could handle it and I didn't want to mix it with the ice cream because it was a little different operation.

Q. I notice at the Talk of the Town you can go to the bar and have a drink and go in and have your food without having to go out and in another door.

A. Well, your Honor, this is outside, all open to the public. We were interested in the public, not the help.

(Testimony of Joseph A. Siciliano.)

Q. Wouldn't that confuse the public terribly if they didn't know where to go to get certain things?

A. I don't think so. It wouldn't confuse anybody.

Q. If a man wanted a sandwich at one place, he would pay for it and so forth and he would have to go to a completely different window to order his malted milk?

A. That is right; we never intended to run the sandwiches and ice cream at the same window.

Q. In other words, he couldn't go to the same window and get everything he wanted to buy?

A. Absolutely not; it wasn't set up for that reason.

Q. Well, it wasn't just happenstance that there was no connection between the two buildings? I mean, that is the way you planned it?

A. Well, they are connected.

Q. Physically they are completely separated except for two back doors? [147]

A. That is right.

Q. You weren't going to have any air conditioning in common?

A. Oh, yea; I was going to have air conditioning in front.

Q. But not operating off the other plant?

A. No; separate because the one in the other part wouldn't carry both places. I had no intention of that.

The Court: Well, that gives me what I wanted. Do you want to ask any questions?

(Testimony of Joseph A. Siciliano.)

Mr. Phelan: I don't think so at this time. I am rather confused.

The Court: Do you want to clarify any of these points?

Mr. Bohn: No; except just one thing.

Redirect Examination

By Mr. Bohn:

Q. As I understand the plant of that place down here—I think I understand your earlier testimony to indicate that you had a remote location and that you wanted to build up a bigger operation to get people there. Was that your idea?

A. That is correct, because the location was very poor at that time.

Q. Is it possible that a hot fudge heater would cost $101?

A. There are certain types that do. The one referred to, I think, came from Honolulu—Johnson Candy Corporation. There are records on that and it is on the books; that is what we must [148] have paid for it.

Q. Assuming that it is an accurate invoice provided on all these items, can you give the court any estimate of their worth or value at the time they were turned over to Dairy Queen?

A. At the time they were turned over you couldn't buy stuff like that on the island and the price paid for it would be a very reasonable price. Either I bought it at Harmon Field through the PX or I had it for a time and it is cheap because

(Testimony of Joseph A. Siciliano.)

if I had to go out and buy it, I would have to pay double or have it sent from the States—for the same piece of equipment.

The Court: That isn't true of reefer panels, is it? You could have put plywood in much more cheaply than $50, couldn't you?

A. Your Honor, if you would look at what that saves in labor and how easy they are to put in, you can understand why reefer panels are cheaper to put up. They are attached by three bolts and you save labor and material. You have two finished walls and all you have to do is paint it. You have that inside and outside, completely finished. I can build you a house $1,800 to $2,000 cheaper with reefer panels. The proof is in my restaurant. It has been up since 1950.

The Court: It would be a pretty good idea to prove——

A. I had to prove this to Governor Skinner at the time of the restaurant and I did. [149]

Recross-Examination

By Mr. Phelan:

Q. You realize that we were asking you about prices in 1952 and 1953? A. That is right.

Q. You still contend that it was impossible to buy stuff here on the island at that time in the same manner to the way it was in 1947 and 1948 and 1949?

A. I didn't say it was impossible. I said if I had

(Testimony of Joseph A. Siciliano.)

to pay at that time I would pay that much or more. I know because I have checked reefer parts and I have been buying that stuff for years. In 1947 they were high. In '48 they were high but as we go on they got lower.

Q. We are talking about 1953.

A. Well, I was not here and I couldn't say. I couldn't be very accurate and give you a right answer because I was not here in '53.

Q. Isn't it a fact that the reefer panels are already rusting out in the Talk of the Town at the base?

A. Oh, no; you are wrong. I can prove that to you. I can show you the reefer panels put up in 1950 and I can get any contractor on Guam to prove it hasn't moved or rusted.

Q. I was up there the other day and noticed where it had. A. Where was that?

Q. Out in front. [150]

A. You were looking at wood, plywood, because they refinished the front. It is 16 inches, galvanized on both sides, glass wool packing, as tight as possible, and as far as I am concerned, the best air conditioned building.

Q. Where does the condensation go?

A. Where does it go?

Q. Yes.

A. At the top they have three little holes. When we get them they are new ones and we took the cork out and that is where it goes.

Q. Were all these panels you had new?

(Testimony of Joseph A. Siciliano.)

A. No; some were new and some were old.

Q. Did you keep a record of what were new and what were old?

A. No; I had stacks of new ones and some old ones. Some can't be used. In other words, we just ripped the galvanized off and it's worth $15.00 a sheet alone and we saved the wood.

Mr. Phelan: I have no further questions.

Mr. Bohn: I have no further questions.

The Court: Very well, thank you.

Mr. Bohn: We have introduced testimony and timecards of the electrician and reefer mechanic. Does your Honor wish me to call them to the stand? Those are the only witnesses we have left. That is maintenance, not a construction matter.

The Court: Well, the testimony, of course, is this work [151] had to be done because this thing had to be rewired and the reefer was broken down, so that's your case and your charge does not appear to be unreasonable assuming that that work had to be done, so I assume that it is up to the defendant to show that it wasn't necessary.

Mr. Bohn: Then that is our case, your Honor.

The Court: Now, let me see—I can suit your covenience. I will probably be through with tomorrow morning's docket before 11:00 o'clock or I can take up again at 1:30 tomorrow afternoon.

Mr. Phelan: Well, if it please the court, I don't recall if I have any motions on tomorrow morning but I would like to have a little time over at the office to dictate some letters.

The Court: There may be motions in connection with one arraignment so we will say 1:30. Now the plaintiff should draw up an order in the joint venture case in accordance with the preliminary order and my instructions this morning and settle with the defendant so that we have a written order to all concerned and get that tomorrow—the order pending the final determination as to how the accounting will be arrived at—one assumes it may be necessary to have an audit; another assumes it will not be necessary to have an accounting.

Mr. Bohn: I understand this is interlocutory?

The Court: This is a temporary order and I am sure everyone understands I want the status quo maintained without the use of any funds except for current operation until the court [152] is able to make final judgment.

Mr. Bohn: I think your order was very clear this morning.

The Court: We will recess until 1:30 tomorrow.

(The court recessed at 5:05 p.m., February 17, 1955.) [153]

Friday, February 18, 1955—2:30 P.M.

The Court: Now, you have rested in Pacific Enterprises, Inc.?

Mr. Bohn: That is right, your Honor.

The Court: The defendant may proceed.

Mr. Bohn: At this time I would like to make a brief motion in connection with a subpoena that was issued.

The Court: Well, I don't know what the defense proposes to do.

Mr. Phelan: I would like to call Mr. Edward Thompson to the stand.

MR. EDWARD THOMPSON

previously called as an adverse witness by the plaintiff, was called as a witness by the defendant and, having been previously sworn, testified as follows:

Direct Examination

By Mr. Phelan:

Q. You are Mr. Edward Thompson?

A. Yes, sir.

Q. Have you been previously sworn in this case?

The Court: Yes; he has been previously sworn in this case.

Q. (By Mr. Phelan): Mr. Thompson, we had testimony yesterday as to the amount of wholesale sales during this period by the Dairy Queen. Have you got the records of Dairy Queen reflecting wholesale sales?

A. Yes, sir; we have invoices and statements prepared by [154] Henry Diza.

Q. Will you tell the court how much they show?

A. I have them over there.

Q. Do they show sales by month?

A. Yes, sir; they do. Here I have a copy of a statement prepared presumably by Henry Diza.

The Court: Now, let's—how long, Mr. Thompson, were you in the wholesale business?

A. We started in August, 1952, in a very small

(Testimony of Edward Thompson.)

way and we are still in the wholesale business in a very small way to Mr. Pedro Ada, Barrigada. We don't use a reefer truck or anything like that because we have insulated packing cases.

The Court: I thought we could possibly get the total figure.

A. The sales for August, 1952, were $43.72; September, $137.76; October, $55.78; November, $97.28; December, $52.64. That is to the end of '52, then in '53 we started selling to Pedro Ada and in January of '53 we sold $72.40 to him and sold $18.85 to the snack bar. In February, '53, $59.30 to Mr. Ada and $75.80 to the snack bar. In March, $114.95 to Mr. Ada and in April we sold $93 to Mr. Ada and sold $203.59 to the snack bar. Since then we have sold to Mr. Ada but not the snack bar.

Q. (By Mr. Phelan): Which snack bar is that, Mr. Thompson?

A. Siciliano's snack bar and we have invoices properly signed by the receiving person. These were not filed. [155]

The Court: That gives us an average of about $65 a month?

A. I would say a little more than that. About $101; I figured it up, your Honor.

The Court: Oh, yes.

Q. (By Mr. Phelan): Now, Mr. Thompson, you were here in June of 1952 at the time that the Dairy Queen opened? A. Yes, sir.

Q. Were you familiar with the installation of equipment in that building? A. Yes, sir.

(Testimony of Edward Thompson.)

Q. Were you familiar with the condition of the equipment in that building?

A. At the time it opened, yes, sir.

Q. Did you use new material?

A. We used new material, I think, except for the reefer. I don't think that was new and I think the contractor used some secondhand material in the construction of the building; I am not so sure about that because I don't know for sure.

Q. Now, your electrical equipment was new?

A. The electrical equipment? You mean the motors and all?

Q. Yes.

A. I don't think so. The electrical equipment—the motors on the freezers and the deep freezes, of course, were all new because they came with the equipment but in the air conditioner and in the walk-in refrigerator it's still possible [156] that they used used equipment. I say "they" when I mean the contractor who put it in.

Q. Yes; now, Mr. Thompson, you have heard testimony yesterday on certain items of equipment belonging to Pacific Enterprises that were installed down there, one item being a hot fudge heater. Now, have you got the price of the hot fudge heater that you said you shipped to Guam?

A. Yes; I have and also I have the hot fudge heaters, if Norman will get them. They are right outside.

Q. Will you please get them, Norman?

A. Yesterday afternoon Mr. Siciliano testified

(Testimony of Edward Thompson.)

that the hot fudge heater for which he billed us $101 was very fine and would have cost us double that at that time. He testified further it was very difficult to get those heaters. We have the heater he put in and we have the heater that I sent out when they ordered hot fudge. When we opened up I didn't think the people on Guam would care for hot fudge in this hot climate, but when I got Henry's order for hot fudge I automatically included the hot fudge heater. The hot fudge heater cost us—Mr. Siciliano's was secondhand and we owed what both he and Mr. Diza said cost $101. The one we bought cost $19.78.

The Court: You have got both heaters? I am going to clear that up right now.

A. It is a model 40 made by the Hemco Company, Chicago, Illinois. That is the price of the two heaters. [157]

The Court: Well, turn the one back to Mr. Siciliano. This involves nothing except heating hot fudge and keeping it hot and ladling it and pumping it out. The $101 heater, if it is agreeable with the parties, I think, can be returned to Mr. Siciliano. Is that the little one or the big one?

A. That is the little one.

Mr. Bohn: I will accept custody of the heater.

The Court: We will forget about the $101.

Mr. Bohn: I would like to say that Mr. Siciliano said it might be possible it was a $101 heater. I am not pressing it; I am accepting the heater.

Q. (By Mr. Phelan): Now, Mr. Thompson, do

(Testimony of Edward Thompson.)

the books of the Dairy Queen reflect the sales by pints and quarts during this 1952 to 1953 period?

A. The books of account never do. That is gotten by analyzing your inventories and supply records. You see books of account are kept in dollars, not in pints and quarts.

Q. So you couldn't turn to these books and say, "during this period we sold so many quarts"?

The Court: Now, the purpose of this line of questioning is to develop the——

Mr. Phelan: The deep freeze and reefer truck.

The Court: Well, the deep freeze was never used, was it?

A. It might have been used when I wasn't here.

The Court: Wasn't the testimony that the deep freeze was [158] put in the warehouse?

A. Put in the unfinished addition; that is where we put it.

The Court: It wasn't used?

A. It might have been hooked up after I left.

The Court: Are you willing to take the deep freeze back?

Mr. Bohn: (Nods head.)

The Court: All right; we will forget about the deep freeze.

Q. (By Mr. Phelan): Mr. Thompson, you testified as to the amount of sales of pints and quarts. Have you got the total figure?

The Court: Now that would relate solely then to the need for the truck?

A. Yes.

(Testimony of Edward Thompson.)

Q. (By Mr. Phelan): You don't have a total figure, do you?

A. I have the figures, yes, but these don't come out of the books of account. The books of account are kept in dollars and cents.

Q. Do you know during the period from June 22, 1952, to August, '53, the total value of wholesale sales?

The Court: He has already given that.

Mr. Phelan: I mean the total.

The Court: The value of what was sold at wholesale of pints and quarts since you didn't use containers, but obviously the sale of over-the-counter pints and quarts can only be measured by consumption of containers? [159]

A. That is right and by our inventory—how many were taken out.

Q. (By Mr. Phelan): Have you got those figures?

A. Yes; we didn't have the inventories for the first few months because Henry Diza had them but I know what the total purchases were and I know we couldn't sell over 3,000 quarts in any one month and one deep freeze will be sufficient. Now with respect to that on January 1, 1953, I wrote Mr. Siciliano a letter reporting on what I found and in that letter I mentioned the fact that they had the holding cabinet. We had the one cabinet. Now it has been testified here that the reefer truck was out there from June 22 until some time in July without exception every day and Joe Meggo testi-

(Testimony of Edward Thompson.)

fied that the larger holding cabinet was there. I write here—this is dated January 1, 1953, and was written that evening—"Joe and he both told me when I saw them last Sunday that we need two more freezers and another deep freeze for quarts and pints yet I have never seen the cabinet as much as half full at any time although every night I told Tony to fill the cabinet every night." Now this letter was not written to influence this court in any suit we might have; it was written as an honest letter.

The Court: Let me ask you this: You have been doing business without a reefer truck?

A. Yes, sir.

The Court: Have you found any need for [160] one?

A. Absolutely none at any time, your Honor.

The Court: Your gross has fallen off?

A. Yes; but some months after when the gross held up to $10,000 a month we didn't need the reefer truck.

The Court: In other words, the question of storage is a problem of management?

A. It is, your Honor, and it is easy when you have a leisure moment or two to put in an extra quart to use those that have been sold. It is no trouble to handle 150 quarts a day, which is far more than you sell, out of this deep freeze.

The Court: Of course, there is nothing to prevent you from manufacturing currently?

A. That is exactly what you are supposed to do.

(Testimony of Edward Thompson.)

The Court: Operate with it full and during the day when you get a slack period replace those that have been taken out?

A. It is as simple as that.

Q. (By Mr. Phelan): Mr. Thompson, what was the wholesale price for a quart of ice cream?

A. Around 54 cents, 50 cents, I think. You can roughly double the sales and that would be the number of quarts a month—about 200 quarts wholesale.

The Court: That assumes, I suspect, when you sell wholesale the retailer is selling it for more than you sell it at the Dairy Queen. I notice your price there is 60 cents a quart now. [161]

A. 65 cents a quart and we were selling it for 50 cents; he made 15 cents a quart.

Mr. Phelan: I have no other questions of this witness at this time.

Mr. Bohn: No questions.

Mr. Phelan: Henry Diza. Will you bring with you the ledger and journal log of Pacific Enterprises? May I have those invoices we put in yesterday?

MR. ERNESTO O. DIZA

previously called as a witness by the plaintiff, was called as a witness by the defendant and, having been previously sworn, testified as follows:

Direct Examination

By Mr. Phelan:

Q. Mr. Diza, you have been previously sworn in this case and you are an accountant for Pacific Enterprises? A. That is right, sir.

Q. You maintain the books of the corporation. Now, Mr. Diza, you identified certain of these invoices which were introduced as Plaintiff's No. 3 yesterday. I hand you Exhibit No. 3 and ask you will you show us how you carry them in your books?

A. This particular invoice, it's entered on journal voucher 21.

Q. On what date? A. July, 1952. [162]

Q. On what account? May I see it?

A. July, 1952.

Q. What is the number of that invoice?

A. Voucher No. 21.

Q. What account is that?

A. That is Dairy Queen.

Q. And, am I correct, the explanation is to take up fixtures for restaurant and Dairy Queen to Pedro? A. Yes.

Q. Show me the next one.

The Court: You are dealing now only with the outside purchases?

Mr. Phelan: Yes; they were introduced. These that were introduced yesterday.

(Testimony of Ernesto O. Diza.)

The Court: I wonder if you could satisfy yourself with two or three of them that postings were made without having to go through every one of them?

Mr. Phelan: If the court wouldn't mind maybe we could take a five-minutes recess.

The Court: Those purchases are included in the building, aren't they?

Mr. Thompson: May I speak?

The Court: Yes, well——

Mr. Thompson: It is obvious that it was carried on the books as Pacific Enterprises, as if the building belonged to [163] Pacific Enterprises.

Mr. Bohn: Just a minute—wait—excuse me, if your Honor please, I didn't realize we had a third advocate in this matter.

The Court: Mr. Thompson made his point. Now Mr. Phelan can ask questions as to whether or not the building was carried on the books as a capital asset.

Q. (By Mr. Phelan): Can you tell me how the snack bar down at Anigua is carried on your books?

A. It is carried on, sir.

Q. As what? A. A building.

Q. On your list of assets?

A. That is right.

Q. Of Pacific Enterprises?

A. That is right, sir.

Q. What value does it have?

A. According to the slips, sir.

(Testimony of Ernesto O. Diza.)

Q. Then your value in the books is only according to the value of the materials?

A. That is right, sir.

Q. So as far as you are concerned the building is worth just the cost of the materials that went into it?

A. That is what my records show, sir.

Q. Have you got that tabulated anywhere? [164]

A. Account No. 125(b), No. 124(c).

Q. Would you please read that entry and what is this document?

A. The trial balance, sir, "Account No. 124(c), building, Dairy Queen."

Q. What is the value? A. $861.16.

The Court: What is that, Mr. Phelan?

Mr. Phelan: That's his valuation of the building.

The Court: $861.16?

Mr. Phelan: Would the court care to look at that?

Mr. Bohn: I have some questions on cross-examination that may clear this up as soon as Mr. Phelan gets through.

The Court: I assume that represents outside purchases.

Mr. Phelan: As a matter of fact, there was a $500 charge in there that didn't belong there and later an adjustment corrected that.

Q. (By Mr. Phelan): What is the exact total of the amount you carry under the account Dairy Queen building?

The Court: Now I am interested whether this

(Testimony of Ernesto O. Diza.)

account is carried as Pacific Enterprises or Dairy Queen building.

Mr. Bohn: Well, would you read to the court the exact entry? What does it say on the books? I am interfering here, Judge, and I shouldn't be doing it but there was another interference. [165]

A. It says here, "Building, Dairy Queen."

Mr. Bohn: Is that all?

A. There is also an explanation here that we bought from Pedro.

Q. (By Mr. Phelan): Read the complete entry. What does it say?

A. "To take up fixtures for restaurant and Dairy Queen, bought from Pedro's."

Q. Will you find us another entry and read us exactly how that is made? Just see what it says in the books.

A. This is journal voucher, 16 July, 1952: "To take up miscellaneous building, Dairy Queen, bought from Marianas Sports Supply Company."

Q. Now, is that the way all of the items are carried? A. That is right, sir.

Q. And is the total of items you have listed that way the amount of outside purchases only?

A. That is correct.

Q. You have listed nothing in that account for materials delivered to Dairy Queen from the Pacific Enterprises, is that correct?

A. That is correct.

Q. You have listed nothing in that account from

(Testimony of Ernesto O. Diza.)

the standpoint of labor for Dairy Queen, is that correct? A. That is correct. [166]

Mr. Bohn: Isn't it correct what you are doing is outside material paid for?

The Court: That doesn't answer my question as to whether Pacific Enterprises books show the building carried on their books as owned by them.

Mr. Thompson: This is just an entry. It says, "Paid for Dairy Queen."

Mr. Bohn: Mr. Thompson, this is not an audit of the books of Pacific Enterprises and with the court's permission, I would please ask you to let your counsel conduct the examination.

Q. (By Mr. Phelan): Where is the account in the ledger here? Can you point that account out to me? A. Account No. 124(c).

Q. This is 125(c).

A. Well, that is a clerical error, Mr. Phelan.

Q. Well, what should the account be? First of all, can you find such an account as you show on this trial balance in this book?

A. That is right, this is where I get that trial balance, $861.16.

Q. Now, have you set up reserve for depreciation on this? A. No, Mr. Phelan.

Q. You have not. Now, would you show me that in the books? A. Here it is.

Q. Now, tell me—you have your accounts—this is your [167] journal?

A. This is the general ledger.

(Testimony of Ernesto O. Diza.)

Q. You have your accounts broken down by major headings, have you not?

A. That is right, sir.

Q. And one of those headings is "Buildings"?

A. That is right, sir.

Q. And you have this building down at Anigua as a sub-account under that heading?

A. That is right, sir.

Q. Do these entries show in the Dairy Queen books? A. No, sir.

Q. Do those books there reflect the Talk of the Town? A. Yes, sir.

Q. Do they reflect the Pacific Bakery?

A. Pacific Bakery, snack bar and Talk of the Town.

Q. Those are the books of Pacific Enterprises?

A. That is right, sir.

Q. Do you have your depreciation account in those books on equipment? A. Yes, sir.

Q. Mr. Diza, one of the items listed here was a ¾ h.p. motor, Westinghouse. Can you find that in your depreciation?

A. Well, I am supposed to have a complete list of equipment, sir. I cannot find it here. This is just figures here. [168]

Q. You don't have it itemized? A. No.

Mr. Phelan: I have no further questions at this time.

(Testimony of Ernesto O. Diza.)

Cross-Examination

By Mr. Bohn:

Q. I have just one or two. Now, Henry, you spent of Pacific Enterprises money whatever it took to pay off these vouchers, is that correct?

A. That is right.

Q. And you listed that total amount as one of the assets of Pacific Enterprises, is that correct?

A. Well, I don't say it's assets for Pacific Enterprises but it shows in my books, "Building, Dairy Queen," whatever you want to call it.

Q. Let me put this another way: You paid these invoices, is that correct?

A. That is correct.

Q. The material went in the Dairy Queen building, is that correct? A. Yes, sir.

Q. And you identified that in your books as "Dairy Queen Building," is that correct?

A. That is right, sir.

Q. And you actually expended the cash of Pacific Enterprises to pay this? [169]

A. That is right, sir.

Q. Just this paid out, is that correct?

A. Yes, sir.

Mr. Bohn: I have no further questions.

The Court: You may step down, Henry.

Mr. Phelan: May it please the court, I am going to call Mr. Thompson to ask him what is in these books.

Mr. Bohn: Just a minute. I am going to object.

You asked Mr. Thompson a few questions and I see no reason why he should answer questions on Pacific Enterprises books except as pertains to the Dairy Queen of Guam.

The Court: The objection will be overruled.

MR. EDWARD THOMPSON

previously called as a witness by the plaintiff and by the defendant was recalled by the defendant and, having been previously sworn, testified as follows:

Direct Examination
(Continued)

By Mr. Phelan:

Q. Mr. Thompson, you are a certified public accountant? A. Yes, sir.

Q. Will you look at these invoices which are Plaintiff's Exhibit No. 3? How are they reflected in the books and how is the building——

Mr. Bohn: I object to that on the grounds the answer will come out as a technical conclusion to which I will object. [170]

The Court: Well, we can find out.

A. I have to borrow Henry's statement of accounts. These accounts are not listed.

Mr. Bohn: You are asking that this letter be used?

Mr. Phelan: Yes.

Mr. Bohn: Will you identify it then?

Mr. Phelan: It is the index of the accounts.

A. Is that No. 124 (c), the Dairy Queen?

Mr. Bohn: Let me see that.

(Testimony of Edward Thompson.)

Mr. Phelan: 125 (c), Mr. Thompson. It says 124 (c) there.

A. Yes, 125 (c), that is right. These accounts are kept as most business houses do—cash and buildings are grouped together. All of the building accounts are grouped in one together—snack bar, Talk of the Town and the building at Dairy Queen property, booked as buildings owned by Pacific Enterprises. It is not included under accounts receivable. They have not charged to it the materials that they furnished themselves.

The Court: I think that is perfectly clear and admitted. In other words, what they did—Mr. Siciliano before he left put up a building. They purchased materials as they needed materials and they charged them to Pacific Enterprises, Inc., and forgot about it and didn't do anything about carrying it on the accounts of Dairy Queen or carrying on any proper practices. The fact is we have got the building and it is up and somewhere along the line we have got to figure what to do about it. I don't think [171] there is any doubt about the way accounts were kept or weren't kept. It might have been their intention never to charge that to Dairy Queen but to operate it as a separate and distinct business for the benefit of Pacific Enterprises. It could have been their intention but, Mr. Thompson, you would cast a very critical eye when you came out and saw a building in some respects a competing business?

A. Yes, I would have in a year later, yes.

(Testimony of Edward Thompson.)

The Court: I am more concerned with the fact that we have a building. I am also concerned with the fact that American Pacific Dairy Products said they had nothing to do with the building; it isn't their building, but they permitted Norman to go in and alter and make a home out of it without any agreement from Siciliano.

A. He took the same chance as Siciliano did. I told Norman that at the time.

The Court: But as president of American Pacific Dairy Products you had no right to tell Norman to occupy property in which you denied any interest.

A. I did deny interest.

The Court: You are currently paying for the power he uses?

A. Yes, he does use some power.

The Court: Air conditioning and so forth—it is all on your bill?

A. All on the bill. I never thought of it, [172] yes.

Q. (By Mr. Phelan): Will you look at this and tell me what account that is?

A. This wouldn't be in there.

Mr. Bohn: I do not believe—I was about to stipulate that such an account is not in the books but I want to find out. I think it is correct. I think such an account is not in the books. I think Henry testified to that yesterday. He kept them on those slips and it is not in the books.

The Court: I think we have to admit that Pa-

(Testimony of Edward Thompson.)

cific Enterprises did not carry an account for the Dairy Queen. It carried no account; no place to enter it.

Mr. Bohn: Except this one item which says "Dairy Queen" and that reflects the outside payments.

The Court: It wasn't the account of Dairy Queen. It was an account of Pacific Enterprises. Now the original testimony indicates that there were certain items that were set up on the books. Now is that limited to these payments for materials?

Mr. Bohn: Limited to these outside payments, that is correct.

Mr. Phelan: The only things which were showed in Pacific Enterprises was money they sent to third parties.

A. Yes, only for payments to third parties.

Q. (By Mr. Phelan): Now I want to ask one other question: Is there any account where Dairy Queen is shown in those books at all? [173]

Mr. Bohn: I am informed that there is an account designated to pay purchases bought for Dairy Queen.

A. And it is the $1,066 that was agreed between the parties.

Mr. Bohn: The only account is one in reverse to pay them. They bought ice cream and that sort of thing and there is no question about that. It has all been paid.

A. No, it hasn't been paid. It is on that state-

(Testimony of Edward Thompson.)

ment and it is deducted. That is how we know we agree.

Q. (By Mr. Phelan): Now is it possible—may I ask this question: Is it possible to tell from the books and records of Pacific Enterprises the amounts of supplies issued to Dairy Queen during that period? A. Dairy Queen supplies?

Q. That were issued from the storehouse?

A. No, that was all kept on Dairy Queen books.

Q. Is it possible to tell from the Dairy Queen books the quantities issued?

A. Yes, that is entered every week—every month.

Q. Can you tell from an inspection of the books, Mr. Thompson, the quantities of frozen strawberries issued from the Dairy Queen books?

A. No, that is kept on inventory cards. The books are only in dollars and cents—everybody at least who uses United States currency, and you don't keep quarts, tons or gallons. That is what we call subsidiary records—in the nature of statistical [174] records rather than operating records.

Mr. Phelan: I have no further questions.

Mr. Bohn: I have none.

The Court: Thank you, Mr. Thompson. Call your next witness.

Mr. Phelan: Norman Thompson.

MR. NORMAN THOMPSON

called as a witness by the defendant, was duly sworn and testified as follows:

Direct Examination

By Mr. Phelan:

Q. Will you please identify yourself for the record?

A. I am Norman Thompson, P.O. Box 725, Agana, Guam, manager, Dairy Queen.

Q. Mr. Thompson, can you tell me if when you were here on Guam you used that reefer truck?

A. I didn't, no, I didn't.

Q. Was the reefer truck down at the Dairy Queen when you came to Guam?

A. Yes, it was plugged in and running.

Q. Was it being used?

A. At times because it was there.

Q. Did you ever use it to haul any materials, any ice cream being sold? A. Yes. [175]

Q. Do you know how many wholesale outlets you had? How many places did you sell wholesale?

A. Well, the day I arrived we had the Pacific Bakery snack bar but I think that was discontinued at the end of April, and we had the Barrigada store of Pedro Ada, the Long Barn store. The Long Barn store we still continue to serve, and we had the Agana store of Pedro Ada in the main part of town.

Q. They were the only wholesale outlets?

A. Yes.

(Testimony of Norman Thompson.)

Q. Now with respect to the deep freeze in the store—how many quarts would you keep in that? How full would it be?

A. The old style we could handle over 100 quarts—six across—118 quarts in a section and then we had another section for pints and we had room for 90 pints and 118 quarts capacity.

Q. That would normally take care of your business at the store? A. Yes, sir.

Q. One deep freeze handled all?

A. That's how many we had when I came here. I wrote Dad that we had Mr. Siciliano's deep freeze here and he sent another one over.

The Court: Let me ask you this, Norman: If I went to get a quart of ice cream could you get it from the deep freeze or could you just take a quart container and take it out of the [176] machine?

A. I could do either you wanted. Some people from Umatic, say, would want hard ice cream and if I take a jiffy bag the ice cream would hold up a half hour or 45 minutes in the jiffy bag, then it starts melting.

The Court: I mean for immediate service.

A. Either one depending on the way you wanted it. Some people come to the window and say "Give me a quart out of the freezer," because they are going home to dinner and will eat it when they get home.

Q. (By Mr. Phelan): Mr. Thompson, there is a list of equipment supposed to be down there—¾

(Testimony of Norman Thompson.)

h.p. motor, Westinghouse, Universal condenser—are you familiar with that list?

A. I am familiar with that list.

Q. Was that equipment there when you took over?

A. No, it wasn't there when I took over and I still haven't come across the Westinghouse motor.

Q. How about the Universal condenser?

A. I imagine that is above the door.

The Court: Let's get that straight. Isn't the ¾ h.p. motor the one that was put in the walk-in?

A. I checked all the motors and I couldn't find that ¾ Westinghouse in the place. I have got a 2 h.p. Westinghouse motor; the other ones are Wagners. I have two Wagner electrical AGE motors and a 2 h.p. Westinghouse at the present time but I [177] haven't seen a ¾ Westinghouse motor.

Mr. Bohn: I believe that was one that was purchased outside and we have a voucher on it.

A. It was but was it ever delivered?

The Court: The testimony was that it was put in the walk-in and the old motor taken out and Pacific Enterprises had the old motor that was completely burned out.

Q. (By Mr. Phelan): The next item after that Universal condenser is a blower.

A. There are two of them, isn't that correct?

Q. Two.

A. They are connected to the air conditioning that Pacific Enterprises put in. The condenser and the two blowers are what I believe they consider

(Testimony of Norman Thompson.)

the air conditioning unit above the door that we have in the store.

Q. Carrier compressor?

A. No, I don't think there is a carrier compressor. Carrier compressors are designed differently but I am pretty sure—it doesn't say the size compressor does it?

Q. No. A. I couldn't tell you.

Q. How about the two electric fans?

A. When I came there there were two electric fans in the salesroom. One wasn't working; one was working.

Mr. Bohn: I believe it was agreed we would take those back. [178]

Mr. Phelan: Cross it off then.

The Court: What do you want to do with the fans? Give them back?

Mr. Bohn: We will go either way, your Honor.

The Court: Well, you have two fans coming to you then and a deep freeze.

Mr. Bohn: We have assumed possession of the other item which is being returned to us.

The Court: You have assumed possession? Oh, you mean of the hot fudge heater.

Mr. Phelan: I have no other questions.

Mr. Bohn: Only one.

The Court: Ask Mr. Thompson about the evaporator. I have a pretty good idea as to what it is but he probably knows definitely. We asked the foreman what a particular item was.

Mr. Bohn: Slimline.

(Testimony of Norman Thompson.)

The Court: No, that's in connection—that is obviously electrical equipment.

Mr. Bohn: That is an air cooler evaporator.

The Court: That was an air cooler evaporator. Now I assume you have some device in connection with air conditioning equipment whereby when you take air in front from the outside it takes the moisture out of it, is that correct?

A. Absolutely correct.

The Court: And is that there? [179]

A. Yes, your Honor. I made a mistake. That was on the other item of $25.

Cross-Examination

By Mr. Bohn:

Q. Universal condenser?

A. Well, that is a unit that looks like a radiator. The air cooler evaporator takes the hot air when it goes through the tubing with freezon going through and it chills the air.

The Court: You need that, don't you?

A. Oh, to make the air conditioner work you need it.

The Court: It says down here $150. Is that about right?

A. For that size unit that is about right. That is the evaporator.

Q. (By Mr. Bohn): I have one question to ask Mr. Norman Thompson. You said about the carrier compressor you didn't know what that is. To try

(Testimony of Norman Thompson.)

to refresh your memory—it says "carrier compressor installed to walk-in reefer." Does that help your memory?

A. No, just the other day the reefer man who built the store was down there. I was complaining about the other store being short of gas in the walk-in equipment in the other store and he came down and he said when he put it in they said it wasn't big enough. It was painted the same color as the rest of the equipment, red, and it doesn't belong to Pacific Bakery.

Q. Was that there when you came? It was already there? [180]

A. It was there when the store was built.

Mr. Phelan: This air conditioning equipment is equipment, though, that would be installed to start with anyway?

A. Not the equipment that is there. We had air conditioning in there.

Mr. Phelan: It is not the equipment that would do this?

A. Yes, it was doing a better job when I arrived and this was not installed properly. This one I have now is properly made for a 5 h.p. motor. That much more freezon has to be present or the compressor must have a larger motor, but that is the maximum according to the government of Guam.

The Court: Am I correct—the freezon under pressure is what does the freezing?

A. Not under pressure. It turns from liquid to gas but you have to get it back in the liquid form

(Testimony of Norman Thompson.)

from gas and when I arrived they tried to bring compressor through the air evaporator which is eight or ten inches thick and cool it by the front one. It wouldn't work.

Mr. Bohn: I have no further questions.

Mr. Phelan: I have no other questions.

Examination by the Court

Q. About how much business are you doing down at the Dairy Queen?

A. Yesterday we didn't do so well but it averages out to [181] $140 to $150 a day. I think Friday to Sunday—Friday night we get the start of it and by Saturday and Sunday we are—provided no thunder showers—we are doing about $230. Week the warm air from the back room, that is from the ends are the biggest days.

Q. You are doing two-thirds of what you did in June, '53? A. June—what did we do?

Q. Roughly $10,000. A. That is correct.

Mr. Phelan: I am going to rest, if it please the Court. The order of proof is rather weird but I think we have proved every point.

The Court: You have no counterclaim?

Mr. Phelan: We have a counterclaim in here. I think we have shown——

The Court: Let me get that out of the way. What did you show in the way of a counterclaim?

Mr. Phelan: Let me get the counterclaim. We have shown the installed property. We have shown

that certain property installed there was removed. We have shown that certain of the supplies were removed and used plywood——

The Court: I don't——

Mr. Phelan: I believe Mr. Meggo testified to the effect that those 12 sheets of plywood that were already there were taken out.

The Court: That goes in the building. [182]

Mr. Phelan: In the building but I don't think the same thing should show twice.

The Court: Well, I think we have to treat that building pretty much as a give-and-take thing.

Mr. Phelan: I have not succeeded in showing cause. I thought these books would show that more supplies came in than were issued out and accounted for; that some were diverted, but we have definitely shown—we haven't shown the value but we have shown that some acoustic tile was used.

The Court: You have shown what?

Mr. Phelan: Their own foreman stated that they used some acoustic tile in there.

The Court: Yes, he didn't know how many square feet.

Mr. Phelan: That is of some value too. Now we have not only the counterclaim but we also have a cross-complaint against Mr. Siciliano.

The Court: Well, anthing we have to take away from one side we have to put in the building; it wasn't charged to you.

Mr. Phelan: If the Court please, if you don't make allowances for it you can in effect show the same figure twice. That is what I am thinking of.

The Court: Yes.

Mr. Phelan: I think that this testimony has substantially shown Mr. Siciliano's obligation to the partnership.

The Court: Are you all through? [183]

Mr. Phelan: We have no further testimony.

The Court: I have an unusual request to make of counsel. Before summing up in connection with this case I would like to have counsels' permission to talk to Mr. Thompson and Mr. Siciliano in chambers.

Mr. Phelan: I have no objection.

Mr. Bohn: We would gladly consent.

The Court: I, at least, before going further in this thing, would like to satisfy myself on a few points in the common interest. Do you mind?

Mr. Thompson: I do not.

The Court: Let's recess for half hour and Mr. Thompson and Mr. Siciliano come in.

(The Court recessed at 2:40 p.m., February 18, 1955, and reconvened at 4:20 p.m., February 18, 1955.)

The Court: I just want counsel to know that I thought it would be of benefit to all concerned if I talked to Mr. Siciliano and Mr. Thompson. I have done so and I am rather encouraged in the view that they are fundamentally interested in continuing on a sounder basis an operation which may be to their mutual advantage, and I think, therefore, as Mr. Thompson is contacting his board of directors and so forth and incidental to my talk, in the Sicil-

iano vs. The American Pacific Dairy Products case that I will do nothing in connection with that case in the formulation of an opinion for a period of 30 days to [184] give the parties an opportunity to develop their plans and see if anything comes of it. Now is that satisfactory, counsel?

Mr. Bohn: I would like to make a statement to the Court for the record that, speaking on behalf of the plaintiff, we appreciate very much the personal interest and time your Honor has taken in this matter and these conferences and the result is completely satisfactory as far as the plaintiff is concerned.

The Court: I am rather impressed with the thought that probably Mr. Thompson and Mr. Siciliano know more about what they are doing than we do.

Br. Bohn: I agree.

Mr. Phelan: I think that is obvious. The other case is just suspended for 30 days?

The Court: Yes.

Mr. Phelan: It would seem to me, your Honor, that either the capital account is $4,000 too high or $8,000 too high. That is my question.

The Court: No, Mr. Thompson tells me that as of May 31 if the $8,000 had not been paid back and was still owed by the partnership, the profit would have been $39,000.

Mr. Thompson: I suggest let the books speak for themselves.

The Court: Now let's get to this case.

Mr. Bohn: Your Honor, if I might interrupt you just a moment. I have prepared that interlocutory judgment that you wished me to prepare and I have showed it to Mr. Phelan and he [185] has agreed that it is accurate and proper.

The Court: Now let's have the items that you agreed upon.

Mr. Bohn: I kept rather complete notes on this, your Honor. Shall I undertake to——

The Court: Let's take up the subsistence and housing.

Mr. Bohn: The subsistence according to my notes totals $2,996.15. That represents two accounts: $975.85 and the figure on the next page of $2,020.30.

The Court: That is accepted as being correct and housing at $465.30.

Mr. Phelan: Will you give me the first total?

The Court: The first total is $2,996.15. Now the use of the reefer truck.

Mr. Phelan: We didn't agree on that.

The Court: You did not agree on it and I don't. I think your figures are high. The reefer was of some advantage but I find no advantage to Dairy Queen insofar as disadvantage to Pacific Enterprises is concerned because your testimony shows that while it may have been used for storage, that its primary purpose was to have it available for reefer purposes for Pacific Enterprises. It had to be kept cold and had to be kept up at all times for that purpose. Now it was used for transportation and so forth, so I think we are going to cut down

the reefer from $1,012.50 to $400. Not as to storage of supplies—admitted. Oh, yes, we have [186] deliveries.

Mr. Bohn: You have two delivery items.

The Court: Yes, I don't see anything that seems to me to be unreasonable.

Mr. Thompson: I think I said so.

The Court: He wanted proof. That gives us a total for hauling supplies of $292.50.

Mr. Bohn: For storage we have an agreed figure of $315.

The Court: Storage, $315. Is that correct, Mr. Phelan?

Mr. Phelan: Yes.

Mr. Bohn: The next item, for freezing, we have an agreed figure of $75.

The Court: Now this maintenance—that is an item I don't know anything. If you check your books it would help out here.

Mr. Phelan: That should be separated into two figures. One is garbage and the other is maintenance, and there is an agreed figure on the garbage.

The Court: The garbage was cut in half.

Mr. Bohn: Yes, $126.50, your Honor.

The Court: $126.50. As I have indicated, in connection with work which was done by Pacific Enterprises boys, I think that there is a strict accounting required, and I am not satisfied that the method that the time was kept satisfies the requirements of the law. Now undoubtedly these services in part, at least, were performed and we are roughly agreed

as to the reasonableness of the charge. Certainly the charge in this case was much less [187] than you could have employed someone outside. Now on the electrician and reefer mechanics I am going to allow 60 per cent of the amount claimed, that is $75.74, $4.33 and $283.00.

Mr. Phelan: $217.84.

The Court: $217.84.

Mr. Phelan: I think that's the figure.

The Court: Remember we agreed on that.

Mr. Bohn: I didn't compute it but everybody here is a better mathematician than I am. We will accept that figure as being an accurate calculation—$217.84.

The Court: And under that item we have $126.50 plus $217.84. It gives me $344.34.

Mr. Phelan: That is right.

The Court: Now that takes care of Item IX.

Mr. Phelan: Yes.

Mr. Bohn: As to No. X we have an agreement on some items and as to others——

The Court: Yes, I will take a look at No. X.

Mr. Bohn: X is the supplies. We had an agreement to the extent of $27.16.

The Court: You want to make these notes: $2.86 I will not allow because it seems to be questioned and that is the imitation vanilla flavoring. The mulch paper was never explained.

Mr. Phelan: That is hand towels.

The Court: You talk about 16 x 36. That is a pretty [188] good-sized paper towel, but anyhow your evidence didn't support that. The item of $6.00

for straws was questioned and in view of a common use in the absence of setting those up on your books as a charge at the time that they were delivered, we will disallow it, which gives us as allowed under item X $3.00, $3.00, $1.96, $3.50, $11.47—granulated sugar is also disputed and may have been paid back out of sugar when it was received. There was some evidence that they borrowed back and forth. Since that was not a charge set up on the books, I think it should be disallowed. $11.47, $2.00, $2.23. Now what is that?

Mr. Bohn: That, I think, is the exact list of agreed items which, if I am correct, totals $27.16, your Honor.

The Court: That is for supplies. Now XI is other expenses. I think those should be allowed. If the paint was not used there it should have been questioned and since certainly it is known on Guam it is not uncommon to get crushed coral for a concrete parking area, so that is allowed in full. $23.45 plus $.66 gives us what? $24.11.

Mr. Bohn: $24.11 is what I have, your Honor.

The Court: Equipment owned by Pacific Enterprises, Inc., No. XII—well, you are not too far off on this. The ¾ h.p. motor I think there could be—subsequent to its installation—there could be some error on that. I think it ought to be clear if there is a Westinghouse motor in the walk-in.

Mr. Bohn: I understood that there was some testimony—— [189]

The Court: I think Norman testified it was a

2 h.p. You have the voucher. I think the probability is that you have something and I am going to allow that. I think it must be there. The condenser is unquestioned, isn't it? The blower—where do we come out on that?

Mr. Norman Thompson: We have them, your Honor.

Mr. Phelan: However, if it please the Court—these items—the testimony of Pacific Enterprises——

Mr. Norman Thompson: The blower constitutes the air conditioner and they took ours and the same for the air cooled evaporator and ¾ h.p. motor, whatever it may be. They have our equipment which they replaced.

The Court: Is the air cooler evaporator used?

Mr. Norman Thompson: I don't know. They replaced ours with theirs.

The Court: Now let's see what we have here. Your electric fans.

Mr. Bohn: We will pick those up.

The Court: The deep freeze?

Mr. Bohn: We will pick that up also.

The Court: The statement was there wasn't a carrier compressor in there. Now what about the compressor?

Mr. Thompson: We have the same one that was in there originally. It was painted by the man who put it in and it is still in there. [190]

The Court: These items I am going to allow: $70 for the motor since it was testified it was put in new and the other was burned out. On the others

I am going to allow 50 per cent upon the assumption that they may have been used. You have no vouchers to show any new purchases on those so I am going to allow you credit, roughly the cost of repairing old equipment, which will give you an allowance on that item of $185.30, is that correct?

Mr. Bohn: Those items, Judge, are $25.00, $45.60, $150.00, and are you allowing the last item of $50.00?

The Court: Well, they can't find it there.

Mr. Bohn: Well, our man testified that it was there but I have no personal knowledge of it.

The Court: Well, Norman says it isn't there—maybe something else but I can't take his word that it was put in there at the same time Norman would know whether or not it is there now, so I am disallowing that. If you find out you are mistaken, you can make an adjustment.

Mr. Bohn: The items then we are getting 50 per cent allowance on are $25.00, $45.60 and $150, is that correct?

The Court: Yes.

Mr. Bohn: I find that totals $220.60, which gives us $110.30.

The Court: It gives you $115.30 plus $70.

Mr. Bohn: Mine came out $220.60 and—— [191]

The Court: You have three items, $25.00, $45.60, $150, and half——

Mr. Bohn: That is correct. I make a total of half which would be $110.30 and added to the $70 would make $180.30.

The Court: Agreed.

Mr. Phelan: I will agree on that. Now may we have the original blower and air cooler back if that was taken out?

Mr. Bohn: Whatever we have you can have. If it was junk you can have it.

The Court: I am just trying to get together now on mathematics. If that is settled that $180.30 is correct that will finish that up. Now what do you have in here that is equipment? What do we have left?

Mr. Bohn: I beg your pardon?

The Court: What do you have left except the buildings?

Mr. Bohn: We have "Other Salaries," one item. Other salaries has been agreed upon—$90.97.

The Court: Oh, yes.

Mr. Bohn: Other salaries we offered no specific proof in this case.

The Court: Well, on those, of course, it was of value but, as I pointed out, you didn't set up charges and there isn't any showing that it meant additional expenditures by Pacific Enterprises, and Pacific Enterprises was never a party to any personnel service contract. They were not charged on your books. [192] Consequently I just have to assume that they were a gratuitous contribution by Mr. Siciliano during this hiatus period when he wasn't sure whether he was coming back or not. Up to this point, Mr. Phelan, do you have any offsets as to those items?

Mr. Bohn: There is one offset, your Honor, admitted in the account Pacific Enterprises owed the

Dairy Queen—an item of $1,066.28, admitted by all parties. That comes off the allowance made to us. We admitted it in the accounting. We made an automatic deduction in the accounting.

The Court: Oh, yes, that comes off your $13,000 figure.

Mr. Bohn: That is correct.

The Court: Now are we down to the building?

Mr. Bohn: Yes, sir.

Mr. Phelan: There is one item there, a supplemental item down at the end—these passport fees and employees' clearances.

Mr. Bohn: Those were all considered to be paid by Dairy Queen.

The Court: Which items are those?

Mr. Phelan: Transportation and——

Mr. Thompson: Transportation and clearances, your Honor.

Mr. Phelan: Down at the end. It is broken down. I can't even pronounce this name.

The Court: Where is it?

Mr. Phelan: It's the last item in the supplemental charges on the breakdown. Those supplemental charges included [193] that item for subsistence, $975.85.

The Court: I haven't got it included, have I?

Mr. Phelan: You have those two included.

Mr. Bohn: That was not admitted. As a matter of fact we didn't introduce any evidence on the differential pay and employees' clearances and those were expenditures by Pacific Enterprises. We didn't

introduce any evidence on it. I will accept any offer Mr. Thompson now makes on it.

Mr. Thompson: We had a letter signed by Mr. Lyle Turner, secretary-treasurer, saying we wouldn't be charged. All we were to pay was subsistence and housing. Now just above that is a salary adjustment we accept.

Mr. Bohn: Then that $90 can be added to the list, if your Honor please.

The Court: $90 for what?

Mr. Bohn: Differential pay and Mr. Thompson has just said he is willing to pay that.

The Court: The differential pay is $90?

Mr. Bohn: That is correct, your Honor.

The Court: Now are we all through except for the building?

Mr. Phelan: I can't remember anything we haven't covered.

The Court: Well, now in connection with the building, the evidence was somewhat in dispute. As a building for sale and knowing something about our construction difficulties in Guam, I could not quarrel with the assumption that 500 square [194] of space for $2,300 in a building is reasonable, nor from a strictly legal standpoint could I quarrel with the concept that if Pacific Enterprises, Inc., had been employed by the manager of Dairy Queen on a quantum meruit basis, that the Dairy Queen would be liable to Pacific Enterprises, Inc., for the reasonable cost of construction, but in connection with both cases and in fairness to all of the parties here, I do not think that the partnership ever

reached a meeting of the minds as to the construction of that building and its use. It may be that—and I think it's quite possible—there may be some future use, increased office needs or something of that kind if these parties get together as I hope, and the building will become increasingly valuable, in which event they will get the benefit. But if I allowed the full claim, which I do not consider unreasonable, I would have to hold that it should not have been constructed without further consultation between the partners and any differential would have to come out of profits to which Mr. Siciliano would be entitled, which is beating the devil about the bush so far as this is concerned. Now I think in fairness, gentlemen, that you do have an existing value there of something like $1,500 exclusive of the septic tank. I think that existing value should be paid after Norman has gotten credit, a reasonable credit, for his labor and his expenditures in converting it to living quarters. It should have a rental value and when Norman occupies it he should be paying a reasonable rental for it, and even if [195] we assume $40 or $50 a month on amortization of the $1,500 cost, the building would pay itself out in a few years and also leave us an additional facility there which can be converted to further use at any time. Now there I am just assuming that this thing moved too rapidly; that if Mr. Siciliano had been here it is highly possible that we would have had some operation down there that would have been of mutual benefit and profitable to both parties, but what we have, because of his absence, because of a

mix-up on the glass and so forth, is a skeleton so to speak just sitting there. Now I am going to allow to Pacific Enterprises, Inc., since Mr. Siciliano is almost the sole owner of that corporation, $2,300 for that building and cesspool with, of course, the understanding that no deductions may then be taken in connection with any partnership claim.

Mr. Phelan: I don't follow that no deduction.

The Court: What I tried to say, Mr. Phelan, was that if I allowed the full value to Pacific Enterprises, Inc., of $2,300, in good conscience I would think that $1,000 of that would have to be taken from Mr. Siciliano's share of the profits. I am taking it off now since Mr. Siciliano has to pay this $1,000 as another loss for not being available to carry out his ideas, is that right?

Mr. Phelan: Yes.

The Court: Let's figure up what we have got.

Mr. Bohn: We come to a quick total of [196] $6,535.55.

The Court: I have more than that.

Mr. Bohn: I haven't had a chance to check it.

Mr. Phelan: I think it would be faster if we run out to the clerk's office and run a tape on this.

The Court: Yes, do that.

Mr. Bohn: Might I read the adding machine tape against your figures? We have $7,600.83. Our total shows, if your Honor please, $7,600.83.

The Court: And off that comes $1,066.28.

Mr. Phelan: Leaving a net of $6,534.55.

The Court: $6,534.55. Very well, the Court finds in this case that as a result of the accounting which

appears in the record, judgment should be given for the plaintiff and against the defendant in the amount of $6,534.55. The plaintiff will prepare a judgment in that amount and execution under that judgment will be stayed for 30 days.

Mr. Bohn: May I ask one question? As to the $2,300 figure—that is not to be deducted from Siciliano's share after ultimate accounting, is that correct?

The Court: The $2,300 figure comes out of profits. In other words, when you have your accounting of the partnership you take out the amount of this judgment except for the cost of subsistence and housing of employees subsequent to the date at which time the Court determined that the partnership was terminated. Which means, in effect, of course, that half of it comes [197] out; now whether it is added to the capital account, I don't know.

Mr. Bohn: Well, that was my thought. It should be added to the capital account.

The Court: My guess is that it's added to the capital account because the entire amount would be paid back to one partner. Instead of trying to do it on that basis and then taking something off Siciliano's and so forth, I am trying to get it straightened out here, so in view of your agreement that judgment will be accepted, you can simply file a judgment in that amount and for the reason I gave you earlier, I think the execution should be stayed until these parties have a chance to get together.

Mr. Phelan: I think it will have to be stayed until we straighten out the books. In connection

with the current books, your Honor, when can Mr. Thompson get ahold of those so he can bring them up?

The Court: If the parties are agreeable I have no objection to permitting them to withdraw the current books. Now that is the ledger subsequent to——

Mr. Phelan: He needs those for current work.

The Court: From July 1st.

Mr. Bohn: We have no objection.

Mr. Phelan: So he can post to it currently.

The Court: Well, these are the books he set up after July 1st? [198]

Mr. Phelan: Yes.

Mr. Bohn: No objection.

The Court: The Court will permit them to be withdrawn and they are under the order here that all books are to be available for inspection whenever they are required.

Mr. Bohn: As I understand the situation, these are turned over to Norman Thompson as trustee of the Court?

The Court: That is right. Norman, you can take along your current books as trustee of the Court for the assets of Dairy Queen. They are put in your custody and are to be available for inspection by an accountant if necessary. Now I take it you have no objection to serving in this capacity, Norman?

Mr. Norman Thompson: No, your Honor, I do not.

The Court: Very well. There being no further

business to come before the Court, the Court will stand adjourned.

(The Court adjourned at 5:10 p.m., February 18, 1955.)

District Court of Guam,
Territory of Guam—ss.

I, Dorothy L. Wilkins, Official Court Reporter for the District Court of Guam, hereby certify the above and foregoing to be a true and correct transcript of the stenographic shorthand notes taken in the above-numbered case at the said time and place set forth.

/s/ DOROTHY L. WILKINS,
Official Court Reporter.

[Endorsed]: Filed June 20, 1955. [199]

[Title of District Court and Cause.]

DOCKET ENTRIES

11-4-54:

1. Filed Complaint.

Issued summons and 2 copies and 2 copies of Complaint to U. S. Marshal.

11-8-54:

2. Filed summons endorsed served 11-5.

11-26-54:

3. Filed Sp. appr. and Motion to Dismiss—American Pacific Dairy.

4. Filed Motion for Change of Venue, etc.

5. Filed Motion for more Definite Statement and Motion to Strike.

6. Filed Notice of Motion. Hearing set for December 10.

12-10-54:

Hearing: Attorneys present. Arguments had. Court denies all motions before court and gives defendant 20 days in which to file its answer.

12-29-54:

7. Filed defendant—American Pacific Dairy Products—Answer and Cross-Complaint.

Issued summons and 1 copy and 1 copy of Answer and Cross-Complaint to U. S. Marshal.

8. Filed Affidavit of Service of Answer and Cross-Complaint.

9. Filed copy of Summons w/return endorsed thereon by U. S. Marshal.

1-19-55:

10. Filed plaintiff's Reply to Counterclaim.

11. Filed Defendant, Siciliano's Answer to Cross-Claim.

1-21-55:

Fwth. Hearing: Attorneys present. Ordered Pretrial Conference set for January 26.

1-26-55:

Pretrial Conference: Attorneys present. Case consolidated with Civil 59-54 and set for trial February 14. Pretrial order to be filed.

12. Filed Pretrial Order.

1-27-55:

13. Filed copy of clerk's letter advising attorneys re filing of Pretrial Order and trial date.

2-2-55:

14. Filed Request for Admission of Facts.

2-9-55:

15. Filed Motion for continuance.

16. Filed motion for severance.

17. Filed demand for Jury Trial.

18. Filed Affidavit of Edward Thompson.

19. Filed Affidavit of Norman Thompson.

20. Filed Affidavit of Finton J. Phelan, Jr.

21. Filed Motion to shorten time for hearing Motions.

22. Filed Notice of Motion. Hearing on Motions set for February 11.

23. Filed Order setting hearings on Motions for February 11.

2-10-55:

24. Filed Objections and answers to requests for Admissions.

25. Filed Notice of hearing of Objections and Motions pertaining thereto.

26. Filed Order allowing service of Notice and Objections prior to February 10.

27. Filed Subpoena to Produce—Joseph A. Siciliano.

28. Filed Dep. subpoena to testify—Henry Diza.

29. Filed Notice of Taking of Deposition of Defendant, Siciliano.

30. Filed Notice of Taking of Deposition of Defendant, American Pacific Dairy Products.

31. Filed Affidavit of Service of copy of Notice of Taking of Deposition—Siciliano.

32. Filed Affidavit of Service of copy of Notice of Taking of Deposition—Diza.

2-17-55:

Trial: Evidence taken; filed Plaintiff's Exhibits 1, 2, and 3. Plaintiff rested. Taking of evidence continueed until 5 p.m. Court recessed until February 18 at 1:30 p.m.

2-18-55:

33. Filed Subpoena to Produce, etc.—Joseph A. Siciliano.

Trial Resumed: Evidence taken on behalf of defendant and at conclusion of which defense rested. At conclusion of all evidence, Court found issues joined for plaintiff as against defendant and Court directed attorney for plaintiff to prepare Judgment in favor of plaintiff in the sum of $6,534.55. Execution of judgment stayed for thirty (30) days. Court ordered that Mr. Norman Thompson, trustee, be permitted to take out any exhibits in Civil Nos. 59-54 and 68-54 he may need in connection with the operation of the business.

Mr. Thompson withdrew Plaintiff's Exhibits G, J, K, and L of Civil No. 59-54.

2-28-55:

34. Filed Judgment.

3-19-55:

35. Filed Notice of Appeal.

36. Filed Bond for Costs on Appeal.

3-22-55:

37. Filed copy of notice to attorney for plaintiff of filing of appeal.

4-14-55:

38. Filed plaintiff's Memo of Costs and Disbursements.

4-16-55:

39. Filed Motion for fixing amount of Supersedeas Bond.

4-19-55:

40. Filed Supersedeas Bond in amount of $7,000.00. Approved by Court.

4-21-55:

41. Filed Motion to extend time for perfecting appeal to June 10th. Approved and so ordered by Court.

4-25-55:

42. Costs to be taxed on April 29. Attorneys notified.

4-29-55:

Forthwith hearing re setting on hearing re tax of costs. Hearing set for May 6.

5-6-55:

Hearing re Tax of Costs. Attorneys present. By agreement clerk ordered to tax costs in the sum of $46.00.

Costs taxed in sum of $46.00.

6-7-55:

43. Filed defendant's motion and Court Order extending for 15 days the time within which to docket and file record on appeal.

6-20-55:

44. Filed Statement of Points on which Appellant Intends to Rely.

45. Filed Designation of contents of Record on Appeal.

46. Filed Court Reporter's Transcript of Proceedings.

(A true copy.)

[Title of District Court and Cause.]

MINUTES

11-26-54:

Defendant, American Pacific Dairy Products, Inc., only, having this day filed Special Appearance, Motion to Dismiss, Motion for Change of Venue, Motion for more Definite Statement, and Motion to Strike, Ordered hearing on said motions had on Friday, December 10, 1954, at 9:30 a.m.

12-10-54—Hearing:

Plaintiff appears by Robert E. Duffy, its attorney.

Defendant, American Pacific Dairy Products, Inc., appears by Finton J, Phelan, Jr., its attorney.

Having heard the arguments of the attorneys for the respective parties on the motions before the court, Ordered all motions be and are denied. Defendant given twenty (20) days in which to file its answer.

1-21-55—Forthwith Hearing:

Plaintiff appears by John A. Bohn, its attorney.

Defendant appears by Finton J. Phelan, Jr., its attorney.

By oral agreement between attorneys, Ordered Pretrial Conference set for Wednesday, January 26, 1955, at 9:30 a.m.

1-26-55—Pretrial Conference:

Plaintiff appears by John A. Bohn, its attorney.

Defendant, American Pacific Dairy Products, Inc., appears by Finton J. Phelan, Jr., its attorney.

Case consolidated with Civil 59-54 and set for trial Monday, February 14, 1955, at 9:30 a.m. Pretrial order to be filed.

2-10-55—Ordered:

Hearings on all motions filed on February 9th and 10th be had on Friday, February 11, 1955, at 9:30 a.m.

2-11-55—Hearing on Motions:

Having heard arguments of the attorneys for the respective parties, the Court Ordered that the following questions in the Request for Ad-

mission of Facts, filed February 2, 1955, should be answered: 1, 7, 8, 10, 11, 12, 13, 14, and 15.

2-17-55—Trial:

Plaintiff appeared by Joseph Siciliano and with John A. Bohn, its attorney.

Defendant appeared by Edward Thompson and with Finton J. Phelan, Jr., its attorney.

Thereupon came the evidence on behalf of the plaintiff and certain documents marked Plaintiff Exhibits 1, 2, and 3 were offered in evidence, objected to, and were accepted over the objection and filed. By agreement of counsel for the respective parties, the Court inspected the addition to the Dairy Queen Building during the noon recess. Certain persons, namely, Edward Thompson, Joseph Siciliano, Albert B. Padua, Ernesto O. Diza, and Joseph Meggo were duly sworn and testified. At the conclusion of the evidence the plaintiff rested. Taking of evidence continued until the hour of 5:00 o'clock p.m. Court recessed until the following day, Friday, February 18, 1955, at the hour of 1:30 o'clock p.m.

2-18-55—Trial Resumed:

All parties present as heretofore. Thereupon came the evidence on behalf of the defendant and certain persons, namely, Edward Thompson and Norman Thompson were duly sworn and testified. At the conclusion of the evidence, the defense rested. At the conclusion of all the evidence, the Court found issues joined for the

plaintiff as against the defendant and the Court directed the attorney for the plaintiff to prepare Judgment in favor of the plaintiff in the sum of Six Thousand Five Hundred Thirty-four Dollars and Fifty-five Cents ($6,534.55). The execution of the judgment is stayed for thirty (30) days.

The Court Ordered that Mr. Norman Thompson, trustee, be permitted to take out any exhibits in Civil Nos. 59-54 and 68-54 he may need in connection with the operation of the business.

Mr. Thompson withdrew Defendant Exhibits G, J, K, and L of Civil No. 59-54.

4-29-55—Forthwith Hearing for Resetting:

Plaintiff appeared by J. J. Novak, its attorney.

Defendant appeared by Finton J. Phelan, Jr., its attorney. Having heard the attorneys for the respective parties, the Court Ordered that hearing for the purpose of determining costs be set for Friday, May 6, 1955, at 9:30 a.m.

5-6-55—Hearing of Taxation of Costs:

Plaintiff appears by J. J. Novak, his attorney.

Defendant appears by Finton J. Phelan, Jr., his attorney.

By agreement between attorneys the clerk is directed to tax costs in the sum of forty-six dollars ($46.00).

(A true copy.)

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Roland A. Gillette, Clerk of the District Court of Guam for the Territory of Guam, M. I., do hereby certify that the following documents, to wit:

1. Complaint, with attached exhibits, filed November 4, 1954.

2. Special appearance and motion to Dismiss, filed November 26, 1954.

3. Motion for Change of Venue on the ground of convenience of parties and witnesses in the interest of Justice, filed, November 26, 1954.

4. Motion for more definite statement and Motion to strike, filed November 26, 1954.

5. Answer and Cross-Complaint, filed December 28, 1954.

6. Reply to the Counterclaim, filed January 19, 1955.

7. Answer to Cross-Claim, filed January 19, 1955.

8. Pretrial Order, filed January 26, 1955.

9. Request for admission of facts, filed February 2, 1955.

10. Demand for Jury Trial, filed February 9, 1955.

11. Motion for Severance, filed February 9, 1955.

12. Objections and Answers to Requests for Admissions, filed February 10, 1955.

13. Judgment, filed February 28, 1955.

14. Notice of Appeal, filed March 19, 1955.

15. Bond for costs on appeal, filed March 19, 1955.

16. Motion for stay, filed April 16, 1955.

17. Supersedeas Bond, filed April 19, 1955.

18. Statements of Points on which Appellant intends to Rely, filed June 20, 1955.

19. Designation of contents of Record on Appeal, filed June 20, 1955.

20. Plaintiff's Exhibit No. I, filed February 17, 1955.

21. Plaintiff's Exhibit No. II, filed February 17, 1955.

22. Plaintiff's Exhibit No. III, filed February 17, 1955.

23. Certified copy of the Docket entries.

24. Certified copy of the Clerk's Minutes.

25. Court Reporter's Transcript of Proceedings.

are the original or certified copies of the original documents filed in the office of the clerk in the above-entitled case.

I do hereby further certify that a certain document entitled "Findings of Facts and Conclusions of Law," being Item No. 11 of the Designation of Contents of record on Appeal, has never been filed in my office and is not now among the records of the above-captioned case.

In Witness Whereof, I have hereunto subscribed my name and affixed the Seal of the aforesaid court at Agana, Guam, M.I., this 23rd day of June, A.D. 1955.

[Seal] /s/ ROLAND A. GILLETTE,
Clerk of the Court.

[Endorsed]: No. 14806. United States Court of Appeals for the Ninth Circuit. American Pacific Dairy Products, Inc., Appellant, vs. Pacific Enterprises, Inc., a Corporation, Appellee. Transcript of Record. Appeal from the District Court of Guam, Territory of Guam.

Filed June 25, 1955.

/s/ PAUL P. O'BRIEN.
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

Nos. 14805 and 14806

AMERICAN PACIFIC DAIRY PRODUCTS, INC., a Corporation,

Defendant-Appellant,

vs.

JOSEPH A. SICILIANO,

Plaintiff-Appellee.

and

AMERICAN PACIFIC DAIRY PRODUCTS, INC.,

Defendant-Appellant,

vs.

PACIFIC ENTERPRISES, INC.,

Plaintiff-Appellee.

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY AND DESIGNATION OF THE RECORD TO BE PRINTED

Appellant in the above-entitled causes hereby adopts as its statement of points on which it intends to rely in this appeal the statement of points as they now appear in the transcript of the records filed herein.

Appellant hereby designates for printing the entire certified transcript of the records save and except that portion which covers the exhibits.

Dated this 1st day of July, 1955.

/s/ BURLMAN ADAMS, of

LITTLE, LeSOURD, PALMER, SCOTT & SLEMMONS,
Attorneys for Appellant.

FINTON J. PHELAN, JR.,
Attorney for Appellant.

Service of copy acknowledged.

[Endorsed]: Filed August 10, 1955.

United States Court of Appeals
For the Ninth Circuit

No. 14805

AMERICAN PACIFIC DAIRY PRODUCTS, INC.,
a corporation, *Appellant,*
vs.
JOSEPH A. SICILIANO, *Appellee.*

JOSEPH A. SICILIANO, *Appellant,*
vs.
AMERICAN PACIFIC DAIRY PRODUCTS, INC.,
a corporation, *Appellee.*

No. 14806

AMERICAN PACIFIC DAIRY PRODUCTS, INC.,
a corporation, *Appellant,*
vs.
PACIFIC ENTERPRISES, INC., a corporation,
Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF GUAM

BRIEF OF APPELLANT AMERICAN PACIFIC DAIRY PRODUCTS, INC.

LITTLE, LESOURD, PALMER, SCOTT & SLEMMONS,
BROCKMAN ADAMS,
Attorneys for Appellant
American Pacific Dairy Products, Inc.
1510 Hoge Building,
Seattle 4, Washington.

THE ARGUS PRESS, SEATTLE

United States Court of Appeals
For the Ninth Circuit

No. 14805

AMERICAN PACIFIC DAIRY PRODUCTS, INC.,
a corporation, *Appellant,*
vs.
JOSEPH A. SICILIANO, *Appellee.*

JOSEPH A. SICILIANO, *Appellant,*
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AMERICAN PACIFIC DAIRY PRODUCTS, INC.,
a corporation, *Appellee.*

No. 14806

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a corporation, *Appellant,*
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Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF GUAM

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LITTLE, LESOURD, PALMER, SCOTT & SLEMMONS,
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Attorneys for Appellant
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THE ARGUS PRESS, SEATTLE

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UPON APPEAL FROM THE DISTRICT COURT OF GUAM

BRIEF OF APPELLANT AMERICAN PACIFIC DAIRY PRODUCTS, INC.

OPINIONS BELOW

The opinion of the District Court in Cause Number 14805 is found in the Transcript of the Record in that cause at page 96. There was no opinion filed in Cause Number 14806.

JURISDICTION

Jurisdiction is based on U.S.C. Title 48, Sec. 1424. Appeal to this Court is taken pursuant to U.S.C., Title 28, Sec. 1291.

QUESTIONS PRESENTED

1. What law governs the formation of a partnership agreement by ratification? The District Court did not discuss this point.

2. Can a corporation enter into a partnership agreement by the unauthorized action of its president when such a power is not authorized by its corporate articles? The District Court's finding on this is not clear since the District Court construed the liabilities to be the same whether there was a formal partnership or not.

3. Does the evidence establish that there was a formal partnership or does it establish a type of joint venture or *de facto* partnership at will by operation of law? The District Court did not decide this question since it considered the liabilities were the same in either situation.

4. Does a change of relationship of partners under the Civil Code of Guam caused by a breach of the agreement by one of the parties cause a dissolution? The District Court held it did not.

5. Can one partner who is not in default himself terminate a partnership at will or a partnership which has no fixed determinable time at any time under the Civil Code of Guam? The District Court did not decide this question.

6. When does dissolution of a partnership occur as opposed to winding up under the Guam Civil Code? The District Court of Guam did not distinguish between the dissolution of a partnership and its winding up.

7. Can a partnership be dissolved and its affairs

wound up without intervention of the court? The District Court did not recognize an out-of-court dissolution and termination of the partnership.

8. Is a partner deemed to have accepted the termination of a partnership by his silence and acquiescence in the terms of the offer of termination? The District Court found that the appellee had accepted his expulsion from the purported partnership but did not find an acceptance of the termination by the appellant.

9. How should the profits of a partnership be divided between the time of dissolution and the time of final winding up of the partnership? The District Court held that the terms of the original partnership agreement applied and the profits were divided 50-50.

10. Is a partner liable for interest on his share of a partnership which is left in the partnership during the period of the winding up of the partnership?

11. Does the evidence support a finding that the appellant ordered the building and materials which were charged to it by the appellee Pacific Enterprises, Inc.?

12. Is the appellant entitled to a jury trial on the suit for an open account on the Island of Guam either by common law or under the Federal Rules of Civil Procedure? The District Court held that it was not so entitled.

13. Was the appellant denied a fair trial by the court's refusal to grant a motion for a change of venue or for a continuance when certain of the appellant's records had not arrived on Guam?

14. Was the appellant denied a fair trial by the Dis-

trict Court allowing the same attorneys to represent the plaintiff and one of the co-defendants in Cause Number 14806? The District Court held it was a fair trial.

STATEMENT OF THE CASE

Any record references in this brief will be to the record in Cause Number 14805 unless a specific reference is made to Cause No. 14806, in the citation such as (R. 14806, p. 35).

This case involved appeals from the decisions of the District Court of Guam in two cases (being District Court Docket No. 59-54 and 68-54 of that court). The first of these cases was an action by Joseph A. Siciliano hereinafter referred to as the appellee, against American Pacific Dairy Products, Inc., hereinafter referred to as appellant, for the appointment of a receiver and for a partnership accounting. The second case, No. 68-54, is an action by Pacific Enterprises, Inc., a corporation, nearly all the shares of which are owned by Joseph A. Siciliano, against a purported partnership composed of Joseph A. Siciliano and American Pacific Dairy Products, Inc. (hereinafter referred to as the Dairy Queen). This second case is an action on an open account. The District Court of Guam ordered that any evidence produced in No. 59-54, which was material, should be considered in 68-54, and that further, the cases were consolidated for purposes of trial (R. 14806, 35).

The appellant is a corporation organized and existing under the laws of the State of Washington. Mr. Edward Thompson is President, and Mr. Herbert S. Little

is Secretary, and the stock of the corporation is held by a number of individuals, with no one stockholder owning more than 20% of its capital stock (R. 187, 188). This corporation was organized for the purpose of opening Dairy Queen stores on Guam and other Pacific Islands to sell at wholesale and retail, soft ice cream products made through the use of a patented process (R. 97).

Mr. Edward Thompson, President of the plaintiff, came to the Island of Guam late in 1950, or early in 1951, for the purpose of obtaining a site and conducting preliminary negotiations for the establishment of a Dairy Queen store. Mr. Thompson met Mr. Siciliano late in 1950, or early in 1951 on Guam, and at that time Mr. Siciliano was a successful business man on Guam known for his energy and business acumen and very friendly and co-operative toward Mr. Thompson (R. 139, 248-249). Mr. Thompson, on behalf of appellant, and the appellee, attempted to make some sort of satisfactory business arrangement regarding the opening of this Dairy Queen store, but finally were unable to do so since the appellee requested at least a 50% interest in the business (R. 141, 251, 317). Mr. Thompson did not want to negotiate on such a basis since none of the stockholders of the appellant had more than a 20% interest in the business (R. 249). The appellant, therefore, obtained a lease and proceeded to construct a store on Guam, known as the "Dairy Queen." It employed a part-time manager named Albert Slaughter and hired a group of Guamanians to complete the store and open the business (R. 317-320).

In June of 1952, Mr. Edward Thompson, President

of the appellant, again traveled from Seattle, Washington, to Guam to supervise the final finishing of the building and the opening of the store. In June, 1952, Mr. Slaughter informed Mr. Thompson that he would be unavailable to act any longer as manager of the store since he was going to Ethiopia, and, therefore, Mr. Thompson would have to obtain another manager (R. 318-319). Mr. Thompson again discussed with the appellee whether he would be interested in managing the business on Guam. During this period and before any agreement with the appellee was consumated, Mr. Thompson, acting on behalf of the appellant, opened the store on Guam on June 22, 1952 (R. 321).

The appellee refused to manage the business for less than a 50% interest and on June 23, 1952, Mr. Edward Thompson, and the appellee, executed a series of agreements which were filed by appellee's attorney. These agreements included a purported partnership agreement, an agreement on investment, assignment of several leases, and a certificate of co-partnership doing business under a fictitious name (R. 141-144, 253-257). Under these agreements the appellant was to contribute to a partnership the leases and building, the store equipment, franchises and supplies on hand, and the president of the appellant was to help with the buying of the supplies in the United States. The appellee refused to accept the $43,000 investment which the appellant had in the business as a basis for his investment and this figure was reduced by Mr. Thompson and appellee to $38,000.00 and this $38,000.00 was further reduced to $30,000 by the requirement that the appellant would carry $8,026.00 as an account payable to it which

was to be paid out of profits of the business if any were earned. The purported agreement provided that the appellee was to advance $15,000 in cash to the appellant for a 50% interest in the business, and the appellee was to receive a salary during the period that he acted as manager of the partnership (R. 97-98). The proposed agreement contemplated that appellee would promote new outlets with an increase in salary as additional outlets should be opened. The appellee agreed to devote such time to managing the business as might be mutually agreed upon *"together with his skill and energy* to the best interest of the business of the partnership" (R. 97-98). The appellee advanced $15,000 in cash to Mr. Thompson, but $7,500 of this was immediately loaned by appellant to the Dairy Queen on Guam to be used as operating capital (R. 323).

Mr. Edward Thompson left the agreements with the appellee's attorney, Mr. Lyle Turner, on Guam, since there were some typographical errors which had to be corrected. These documents remained on Guam in the possession of Mr. Turner until the middle of July, 1952 (R. 329, 330).

After completing the opening of the store and executing the above agreements, Mr. Thompson left the Island of Guam and returned to the United States. For a period of eight or nine days the appellee managed the business.

On July 2, 1952, nine days after executing the above agreements, the appellee left the Island of Guam and came to the United States and remained continuously away from the Island of Guam and in the United States

for a period of more than two years. Upon arriving in the United States on July 2, 1952, the appellee called Mr. Thompson, the president of the appellant, at 3:00 in the morning, and informed him that he was in the United States but would be returning to Guam within a very short period of time but this turned out to be a period of two years (R. 99-100, 328).

After this, in the middle of July, 1952, Mr. Thompson, the president of the appellant, received the agreements which had been executed on Guam (R. 329). In August, 1952, he presented this matter to the Board of Directors of the appellant. But since the appellee was not on the Island of Guam, managing the business, the Directors preferred not to act on the agreements until it could be ascertained whether the appellee would be able to fulfill his part of the agreement (R. 330). It was suggested that the matter be held up a few weeks and this was done and no further action was taken by the Board of Directors of the appellant until Oct. 6, 1952 (R. 330).

On October 6, 1952, a resolution was passed stating that the partnership agreement was ratified only if certain conditions were met, including the return of Joseph A. Siciliano to Guam. A copy of this resolution was sent to the appellee and received by him (See Def. Ex. E, R. 343) (R. 46 and 48). Several days later a personal letter was sent by Mr. Edward Thompson to the appellee's attorney on Guam, stating that Mr. Thompson and two of the other directors of the appellant, while discussing other matters, had generally approved the agreement (Pl. Ex. 7, R. 382).

The appellee did nothing with respect to the resolution of October 6, 1952, and during the next few months did not inform the appellant of what his future plans would be. From July, 1952, until April, 1953, the appellant attempted continually to persuade the appellee to return to Guam. The appellant was informed that the appellee was having marital difficulties and Mr. Thompson, the president of the appellant, wrote to the appellee's attorney, stating that if the 60-day requirement of the October 6, 1952, conditional ratification was too difficult, he would attempt to persuade the Board of Directors of the appellant to extend this time to 90 or even 120 days (R. 328-329). The appellee did not reply to these requests, and on April 4, 1953, the Board of Directors of the appellant adopted a Resolution, setting forth the background of the *de facto* partnership and stating that since Mr. Siciliano had not replied to their previous letters, or met the conditions set forth in the conditional ratification of Oct. 6, 1952, and since he evidently was not going to return to Guam in the near future, that the Board refuse to ratify the proposed agreement and the *de facto* partnership was terminated as of April 21, 1953, and appellee's $15,000 investment, less damages he might have caused, was tendered to him (Def. Ex. F, R. 344; R. 59-67, Ex. E attached to answer). A copy of this Resolution, as set forth in the pleadings, was mailed to the appellee and received by him (R. 48, 68). At the time of this Resolution the appellant tendered to the appellee or the receiver in the action of *Siciliano v. Siciliano,* the sum of $15,000, but were not able to physically tender this money to the appellee since there was considerable confusion on

Guam in the appellee's affairs, and no one knew to whom the money should be formally presented (R. 269-270, 385).

After adopting this resolution the appellant appointed Mr. Norman Thompson as manager of the Dairy Queen store on Guam. Mr. Norman Thompson arrived on Guam on April 22, 1953, and within a few days had taken complete charge of the books and operations of the Dairy Queen Store on Guam (R. 297, 383, 394).

In June, 1953, the books of the Dairy Queen of Guam, which had been kept on a partnership basis by an employee of the appellee, were forwarded to the United States, and Mr. Edward Thompson, the president of the appellant, established a new set of books based on the Dairy Queen store operating as a corporate enterprise starting Sept. 1, and ending August 31st of each year.

During the period from July 2, 1952, when the appellee left the Island of Guam until April, 1953, when Mr. Norman Thompson took over the management of the business, the Dairy Queen store was operated by Filipino employees (R. 153-155). The men were brought to Guam by Pacific Enterprises, Inc., a corporation wholly owned by the appellee except for a few qualifying shares. There was no direct management of the store, but Henry Diza, a bookkeeper of Pacific Enterprises, Inc., kept some books for the operation and Joseph Meggo, an employee of Pacific Enterprises, Inc., supervised the employees (R. 166, 171, 185, 275). Pacific Enterprises, Inc., presented a bill for all the services rendered by anyone and appellant has offered to pay all

the legitimate charges for subsistence, wages and housing for all employees for materials furnished (R. 14806, 4-14, 60, 61, 225).

The appellant had to finally completely take over the operations to protect itself. The appellee did not object to this and did not file suit until Sept., 1954 (R. 101-103).

When the appellant's manager arrived on Guam, the conditions were very bad in the store. Among such conditions, as listed in trial court's findings were (R. 101-102):

(a) The sanitary conditions at the store were not good.

(b) The cash receipts were not deposited daily but the bags containing returns were kept in the safe with Pacific Enterprise's funds, often in large amounts.

(c) The books of the purported partnership had not been posted for a long period of time.

(d) There was an intermingling of accounts in that Pacific Enterprises, Inc., was furnishing supplies and services for which no charges were being posted.

(e) The store was operated irregularly and with insufficient controls.

(f) The cash register had broken down and was not replaced or repaired for a long period.

During this period the President of the appellant, Mr. Edward Thompson, did all the main purchasing for the operation (R. 330) and was forced to travel to the Island of Guam in December, 1952, to straighten out the operation (R. 335-338).

The Filipino bookkeeper in charge of obtaining supplies, paying bills and handlng the cash sent reports to Edward Thompson (R. 280-281). These were often late. Mr. Edward Thompson would send invoices for supplies, checks for payment of expenses and letters on the operation to this employee (R. 171, 295, 297, 298). The bookkeeper understood that the Dairy Queen was not part of the Pacific Enterprises organization (R. 295).

During this period the appellee, Joseph Siciliano, did not send any instructions to the man in charge of buying supplies, paying expenses, accounting for the cash, and keeping the books and the employee didn't make any reports to him (R. 294). The employee in direct charge of the other employees did not even make a written report to the appellee or receive any written instructions from him and during two years only talked to him on the telephone twice (R. 179). The appellee did nothing else in the way of managing the Dairy Queen store after July 1, 1952.

During the period of operation by Mr. Edward Thompson and employees connected with Pacific Enterprises, Inc., the sale of soft ice cream products was new on the Island of Guam and was very successful. The success of the business from the latter part of 1953 to date has depended upon business conditions upon Guam which suffered several major drops because of business conditions on Guam and the construction program of the United States Government.

Several months after termination of the *de facto* arrangement, starting in November, 1953, the appellant began its program of expansion to additional stores

which had been contemplated at the time of the original meeting with the appellee, but which had not been started prior to this time because of the difficulties suffered by the Dairy Queen (R. 10, 239). This expansion took the form of the building of another store by means of a corporation known as Guam Frozen Products, Inc., which is partially owned by appellant and partially by several other individuals (R. 243-246, 265). This store has purchased some supplies from American Pacific Dairy Products, Inc., and Norman Thompson, the manager of the store.

Immediately after Mr. Edward Thompson left the Island of Guam in 1952, the appellee constructed a building on the Dairy Queen property adjacent to the Dairy Queen store (R. 99). The appellee states that he had told Mr. Edward Thompson about this building but Mr. Edward Thompson denied it (R. 99). There was conflicting testimony as to the purpose of this building, but it was to sell some type of food product other than soft ice cream. When Edward Thompson discovered that this building was being built (the Fuller Co. in San Francisco sent him an invoice for glass to be placed in the building), he refused to honor the invoice for the glass and told Mr. Siciliano that he did not want the building (R. 14806, 71-79). This building was never finished for the purposes above stated and remained vacant for nearly two years. In November, 1953, Mr. Norman Thompson asked whether he might not repair this building himself and make some use of it. Edward Thompson, President of the appellant, told Norman Thompson that he could do what he wanted with it but that he took the risk of losing his

money since the appellant denied all interest in it (R. 14806, p. 71) (R. 341). Mr. Norman Thompson did repair the building and at the present time is using it as his living quarters. There is no connection between these two buildings other than the going out the back door of one and entering the back door of the other (R. 14806, 165, 169).

During the period from June, 1952, to April, 1953, Pacific Enterprises, Inc., a corporation owned by the appellee, Siciliano, was supplying items and equipment to the Dairy Queen store. The second case involved in this appeal is a suit on an open account by Pacific Enterprises, Inc., against Joseph Siciliano and American Pacific Dairy Products, doing business as the Dairy Queen of Guam.

Pacific Enterprises, Inc., did not have an account for the Dairy Queen of Guam during this period and did not create an account on its books for many items until August, 1954, just prior to the bringing of the suit. No bill was rendered to the Dairy Queen until many months after the services were rendered.

The parties agreed upon certain items, but many items in the bill were dropped as being unable to be substantiated or because they were greatly inflated. The remaining items in dispute concern the rent charged for a refrigerator truck, the delivery of some crushed coral, the charging to the Dairy Queen of certain equipment alleged to have been supplied from Pacific Enterprises, Inc., equipment and a charge of $2,300 allowed by the court as a cost of the additional building and a cesspool behind the building. The appellant denies any interest

in the building or any rent for the refrigerator truck and denies the other items were supplied.

The court stated in its interlocutory judgment that an independent accountant would audit the books of the corporation and the Dairy Queen and would establish a figure for net profits. This was not done, but instead the court accepted the reports of the Pacific Enterprises, Inc., employees as to the net profits and expenses of the Dairy Queen and granted judgment to the appellee, Joseph Siciliano, in the action for an accounting based on the profits reported by Henry Diza.

The court granted judgment for the appellee, Joseph A. Siciliano, in the action for an accounting in the sum of $34,376.95, together with interest at 6% from July 1, 1953, to the date of entry of judgment. This amount was computed as follows:

(a) Return of capital	$15,000.00
(b) Capital improvements paid out of profits	4,000.00
(c) One-half value of additional building	1,150.00
(d) One-half net profit	16,876.75
	$37,026.75
Less one-half Pacific Enterprise judgment after deducting $1,234.95 for subsistence paid after July 1, 1953	2,649.80
Balance	$34,376.95

The court granted judgment in the case of *Pacific Enterprises, Inc. v. American Pacific Dairy Products, Inc.,* in the sum of $6,534.44, which was based upon a

finding of an account due Pacific Enterprises, Inc., in the sum of $7,600.83, less a set-off of $1,066.28, leaving a net of $6,534.55. This amount included $2,300.00 for the building constructed by Pacific Enterprises, Inc., $400.00 for the rent of a refrigerator truck, $180.30 for the equipment furnished and $24.11 for other miscellaneous expenses all of which were denied by the appellant and are appealed.

SPECIFICATION OF ERRORS

Appellants rely upon the following errors of the court below:

1. The court erred in entering judgment for the plaintiff against the defendant in Cause No. 14805 (R. 14805, p. 114-115), in that such decree is not supported b ythe evidence nor by the findings of fact and conclusions of law.

2. The court erred in entering judgment for the plaintiff against the defendant American Pacific Dairy Products in Cause No. 14806 (R. 14806, p. 49), in that such decree is not supported by the evidence nor by the findings of fact and conclusions of law.

3. The court erred in finding there was some type of formal partnership or in treating the relationship between the parties as a formal partnership when none actually existed (R. 14805, p. 103, 114).

4. The court erred in holding that the partnership had been ratified by the defendant (R. 14805, p. 100) as such conclusion is contrary to the law and the weight of competent evidence in that there is no evidence to support a finding of ratification other than the conditional ratification set forth in defendant's Exhibit E.

5. The court erred in ignoring the separate corporate entity of the defendant corporations and in admitting in evidence plaintiff's Exhibit 7 (R. 381) and in concluding that exhibit showed corporate ratification (R. 14805, p. 101) in that said admission and conclusion are contrary to law and the weight of competent evidence.

6. The court erred in concluding that the plaintiff continued as a full partner until July 1, 1953 (R. 14805, p. 108, 113) although he breached the agreement as of July 1, 1952, as such conclusion is contrary to law and is not supported by the weight of competent evidence.

7. The court erred in making supplemental finding of fact number 2 (R. 14805, p. 110) on the ground that said finding is contrary to the evidence.

8. The court erred in making supplemental finding of fact number 4 (R. 14805, p. 111) that the total undistributed profit as of July 1, 1953, was $33,753.49 as this was contrary to the evidence and included the sum of $2,350.00 which was arbitrarily established by the court without the support of any evidence.

9. The court erred in entering supplemental finding of fact number 6 (R. 14805, p. 111) in that it was contrary to the evidence that the sum of $8,000.00 was paid out of gross profits, and increased capital assets.

10. The court erred in entering supplemental finding of fact number 10 (R. 14805, p. 112) and conclusion of law number 4 (R. 14805, p. 113) that the plaintiff was entitled to $34,376.95 as his share of the purported partnership as the said finding and conclusion of law are contrary to law and contrary to the weight of competent evidence particularly as regards items (b), (c),

(d) and the amount of the judgment which reduced these items.

11.The court erred in entering supplemental finding of fact number 11 (R. 14805, p. 113) and supplemental conclusion of law number 4 (R. 14805, p. 113) that plaintiff was entitled to interest on the amount of $34,-376.95 at the rate of 6% from July 1, 1953, to the date of the entry of the judgment, as such is contrary to law and to the weight of the evidence.

12. The court erred in granting to the plaintiff a full 50-50 share of the profits from July 1, 1952, until July 1, 1953 (R. 14805, p. 112), as this was contrary to law and to the weight of competent evidence since even if there was some type of partnership the plaintiff was only entitled to a proportionate share of the profits.

13. The court erred in both cause No. 14805 and cause No. 14806 in denying defendant's motion for a continuance and for a change of venue.

14. The court erred in entering Supplemental Findings of Fact and Conclusions of Law and Final Judgment on April 7, 1955, without notice to defendant contrary to the terms of the Interlocutory Judgment entered the 18th day of February, 1955, providing for an accounting between the respective parties (R. 114-115).

15. The court erred (Cause No. 14806) in permitting attorneys for the plaintiff to represent the co-defendant Joseph Siciliano and in denying defendant American Pacific Dairy Products' motion for severance (R. 14806, pp. 40-41).

16. The court erred in not dismissing the plaintiff's

claim in Cause No. 14806 *in toto* and particularly Items IV, XI, XII (R. 14806, pp. 5-8) and the addition to the building (R. 14806, p. 235) since these items were not supported by the weight of competent evidence and are contrary to law.

17. The court erred in not filing findings of fact and conclusions of law in cause No. 14806.

18. The court erred in denying the defendant American Pacific Dairy Products' demand for jury trial as such a denial was contrary to law.

19. The trial court erred in applying the law of Guam to determine if there was a formal partnership as such method was contrary to law.

SUMMARY OF ARGUMENT

The trial court should have used the law of the State of Washington as the place of ratification to determine if there has been a partnership agreement established.

There was never a formal partnership agreement between the parties because the appellant never ratified the proposd partnership.

There was a *de facto* partnership or joint venture between the parties starting June 23, 1952, with the appellee to act as manager, but this was dissolved by the appellee's breach of agreement on July 1, 1952, when he left the island of Guam.

After the dissolution of the partnership, the appellant continued the business with the help of Filipino employees, some of whom were connected with the corporation known as Pacific Enterprises, most of the

stock of which is owned by the appellee. The appellee did not give any instructions or do any managing of the business.

The appellant continued to manage the business with the Filipino employees from July 1, 1952, until April 21, 1953. During this period the appellant's president tried repeatedly to persuade the appellee to return so that the partnership agreement could be ratified according to its original terms but the appellee did nothing. Pacific Enterprises has rendered a bill for all materials furnished and services performed.

On April 21, 1953, the appellant sent a notice of termination to the appellee, attempted to tender his capital contribution to him, placed its own manager in the store and completely took over the business. The appellee accepted this by his silence in not replying to appellant's notice.

The appellant did not get its books finally set up on a corporate basis until July 1, 1953, but this was because the appellant's offices are in Seattle, Washington, and the operation is on Guam.

The appellant's position is that the *de facto* partnership was dissolved on July 1, 1952, by the appellee's breach of the agreement and therefore appellee is only entitled to:

Capital contribution	$15,000.00
50% of profits June 22 to July 1, 1952	Nil
Less damages (None proven)	Nil
Net balance	$15,000.00

This is based on Sec. 2324 of the Civil Code of Guam that the partner who causes a dissolution of a partnership by his fault is entitled to the value of his partnership interest on the date of dissolution without any amount to be given for good will. The appellant's position with regard to profits after dissolution is that the appellee by his action in refusing to comply with the agreement or reply to appellant's attempts to settle the matter has forfeited his right to any profits for the period after dissolution, and by his silence accepted the appellant's offer to return his capital contribution.

If the court should decide that the appellee has not by his actions forfeited all right to profits, then the appellee would be entitled to share in the profits according to his proportionate capital contribution from the date of dissolution until the partnership was wound up by the appellant's tender and termination on April 21, 1953. The appellant contributed $42,500.00 worth of assets to the business and the appellee $15,000.00. Therefore, appellee would be entitled to:

Capital contribution	$15,000.00
($15,000 / ($57,500 x (profits to April 30, 1953))	8,013.99
or	
(26% x $30,823.04)	
Total	$23,013.99

Less any Pacific Enterprises judgment.

The appellant's position is that this is the proper way to compute the judgment, but even if the trial court's method of using July 1, 1953, should be used, the trial court erred in simply creating profit figures of

$2,350.00 for the month of June, 1953, and in accepting Henry Diza's figures for profits of $31,403.47 without having an audit made.

Even if the trial court's method and termination date should be used, the trial court improperly computed the judgment. The court added one-half of $8,000.00 worth of assets on the theory that profits had been reduced in this amount, and $1,150.00 as one-half the value of a building which appellant didn't order and doesn't want. In addition, the court failed to take into account in the Pacific Enterprises judgment reducing the court's judgment in the accounting case $1,066.28 of expenses which were paid for by a set-off.

In the Pacific Enterprises suit Cause No. 14806 the trial court based the judgment as a whole on very unsubstantial evidence. The appellant appeals only as to four items. The rental of a refrigerator truck which was never ordered by appellant and never needed. Two different sets of materials which were not shown to have ever been supplied or needed. Finally the charge by the trial court of $2,300.00 for an addition to the appellant's building which was built by the appellee for his own purposes, never used by the appellant, and which appellant does not now want.

The appellant also urges that the trial court did not grant the appellant a fair trial. The appellant's demand for jury trial in Cause No. 14806 was improperly denied. The appellant's request for a change of venue and a continuance in both Cause No. 14805 and 14806 was denied and appellant could not obtain all of its records in time to present them at the trial. The trial

judge allowed the same attorneys to represent both the plaintiff and the co-defendant Joseph Siciliano in Cause No. 14806. Finally in Cause No. 14805 it had been decreed by the judge in the Interlocutory Judgment that there would be an accountant appointed to establish the books and the profit figures involved. This was never done and the court filed its Supplemental Findings of Fact and Conclusions of Law and Final Judgment without giving the defendant notice of said action.

ARGUMENT

I.

The Trial Court Should Have Used the Law of the State of Washington to Determine If There Was a Formal Partnership, and If No Formal Partnership Existed, Then the Law of Guam to Determine the Effect of the Appellant's Actions on Guam

A. The law of the forum decides as a preliminary question by the law of which state questions concerning the formation of a contract are to be determined.

The trial of these cases took place on the Island of Guam, and the trial court should have decided as a preliminary question the law of which state determined the formation of a partnership contract. Restatement, Conflict of Laws, Sec. 311.

The appellant has not been able to find any cases from the Territory of Guam determining the conflict of law question as to which state law determines if a partnership agreement has been consummated. Therefore, the appellant has consulted the general reference works such as the Restatement, Conflict of Laws (1934)

to establish the proper conflict rule which should have been applied by the trial court.

B. The partnership relationship requires that the parties thereto agree to it under established principles of contract law.

A contract, express or implied, is essential to the formation of a partnership. See Guam Civil Code, Section 2400. See also California Corporation Code, Section 15006, and cases cited in II. of this brief.

Certain rights and liabilities of a partnership nature can be imposed upon a party without a contract but in order to have a *de jure* partnership the elements of a contract must be present.

C. The obligations of partners are determined by the law of the place where the agreement of partnership was made.

The creation of a partnership by contract between the parties is determined by the law of the place where the agreement of partnership is made. Restatement, Conflict of Laws, Sec. 342. Comment (a) states in part with regard to partnerships:

> "Such an agreement involves a manifestation of willingness to enter the relationship by one party and an acceptance thereof by the other. If the relationship is created by an agreement which is binding as a contract, the obligations of the parties as between themselves are governed by the law of the place of contracting. If the agreement does not constitute a contract, the obligation of the parties as between themselves are governed by the law of the place of agreement."

D. The "law of the place of contracting" is the law of that state where the final action takes place which is necessary to form a contract.

There are several theories as to which law should be used in determining the validity of a contract. The Restatement, Conflict of Laws; Professor Beale, in his article, *"What Law Governs the Validity of a Contract,"* 23 Harvard Law Review 1, 79, 194, 260; and Judge Goodrich in Goodrich, Conflict of Laws (3rd Edition, 1951), page 323, all favor the rule of the "Place of Making" approach to the problem. The second theory is to use the "place of performance." The third approach is to use the "intention of the parties." The fourth approach is to use the "law which upholds the contract." The text writers and authorities seem to be generally agreed that the "place of making" of the contract is most generally followed by the courts now with the place of performance coming second, and the other two theories third and fourth, respectively.

As pointed out previously the partnership relation is a contractual relationship and, therefore, the principles applicable to contracts should be applied to determine if a contract of partnership was established.

The "law of the place of contracting" determines the validity and effect of a promise with respect to mutual assent or the absolute or conditional character of the promise. Restatement, Conflict of Laws, Sec. 332. The determination of the "place of contracting" is the place in which under the general law of contracts, the principal event necessary to make a contract occurs. Restatement, Conflict of Laws, Sec. 311, Comment (d).

When an acceptance is sent from one state to another with the intention of forming a bi-lateral contract the "place of contracting" is the state from which the acceptance is sent, unless delivered by an agent directly. Restatement, Conflict of Laws, Sec. 326.

E. The law of the place of ratification determines if a contract has been formed.

There is no established rule for determining the "place of contracting" when a ratification of the contract is necessary. If a contract were made through an authorized agent, acting contrary to his instructions, and ratified by the principal, the place of contracting is where the agent acted. Restatement, Conflict of Laws, Sec. 331. However, when an agent acts contrary to his instructions and the principal does not ratify, it would seem that there is no contract and therefore whether a contract is formed would have to be determined at the point of ratification. As stated by Prof. Stumberg in Stumberg, Principles of Conflict of Laws (2nd Edition, 1951) at page 230:

> "Some difficulty might be encountered when an unauthorized agent acts in one state, but his acts are ratified in another. It would seem that the ratification is the event which 'creates the obligation.' The principal has exercised in the state where he ratifies, a power which brings the contract into life.[30] Yet the place of contracting is said in the restatement to be where the agent acted.
>
> "([30]) If the principal does not ratify there is no contract. Ratification is, therefore, the event which creates the contract."

It is the appellant's position, therefore, that the

"law of the place of contracting" on a contract which requires ratification, is the law of the state in which the ratification must take place and that state must be referred to to determine whether or not a contract was formed by the ratification. Restatement, Conflict of Laws, Sec. 331.

F. The law of the state of appointment of the agent determines the scope of his authority and the necessity for ratification.

The obligation of a principal and his agent as between themselves is determined by the law of the place where the agreement of agency was made. Restatement, Conflict of Laws, Secs. 342 and 343 and 345. The relationship between the corporate president and his corporation as to whether his actions were authorized would, therefore, be determined by the place of appointment of the corporate agent which, in this case, was the State of Washington.

G. Ratification of the contract was required since the president of the appellant was not authorized to enter into a partnership agreement and, therefore, the law of the place of ratification is the law of the "place of contracting" which determines whether a contract of partnership was formed.

It is the position of the appellant that under the law of the State of Washington, or under the law of the Territory of Guam, ratification of the corporate president's actions was required in order to establish a formal contract. See cases cited in Part II of this brief. The Board of Directors of the appellant and most of the stockholders of the appellant are in the State of

Washington, and ratification was, therefore, required in the State of Washington.

H. The law of the State of Washington, therefore, determines if ratification was necessary and if a formal contract of partnership was consummated.

As pointed out previously the law of "the law of the place of contracting" for a partnership determines if there has been partnership formed and the "place of contracting" is "the place of ratification" when ratification is required. The law of "the place of ratification," therefore, determines if a contract has been formed. Therefore, the law of the State of Washington determines if a contract of partnership was ever created by ratification.

I. If there was no authorization to act the law of the place of the act which was Guam determines the effect of the corporate president's action.

If the action of the corporate president was not authorized and, therefore, no contract of partnership was formed the corporation may still be held liable for the effect of its actions. If this is done the law of the place of the corporate agent's action determines its effect. Restatement, Conflict of Laws, Sec. 166, Comment (c).

II.

No Formal Partnership Agreement Existed Between Appellant and Appellee

There seems to be no doubt that there must be a contract, express or implied, between two parties in order to create a partnership.

The State of Washington has adopted the Uniform

Partnership Act and its decisions follow the general rules regarding the necessity of a contract to establish a partnership. The general rule is well stated in 40 Am. Jur., Partnerships, Sec. 17:

> "One of the chief characteristics of the partnership relation is that it is created only by the voluntary contract of the parties. In fact, in practically all definitions of partnership an element of contract is fundamental. An actual partnership relation does not arise by operation of law in any case; persons do not become partners except by agreement, express or implied, nor can a new partner be introduced in a partnership except by consent of the members. A partnership liability may be imposed upon a person under principles of estoppel, where he holds himself out or permits himself to be held out as a partner in an enterprise. In such cases there is no actual or legal partnership relation, but merely a partnership liability imposed by law in favor of third persons."

In this connection see also 40 Am. Jur., Sec. 23.

See also Guam Civil Code, Sec. 2400, California Civil Code, Sec. 15006, and Crane Handbook on Partnerships (Hornbook Series, 1938) Sec. 5, page No. 20.

A. A trial court did not find there was a formal partnership and did not consider such a finding necessary to support his decision.

The trial court was not completely clear in its opinion and findings of fact as to whether it considered that a formal partnership existed or whether it was holding the appellant on the basis of an implied partnership or on a liability created by operation of law. The court's remarks and findings taken as a whole, however, seem to reflect a finding of no partnership.

The trial court rejected as a "fiction" the appellant's argument that a ratification of the formal partnership agreement was necessary in order to create the partnership (R. 100, R. 381). The court, however, did not find that there was a formal partnership between the parties. In its informal remarks to counsel the court stated as follows:

> "It is my view that this partnership agreement, so-called, is not authorized in law. So far as I can determine the articles of incorporation of the defendant do not authorize it to enter into partnership agreement, * * * If it is not a partnership, it is a joint enterprise. I think it is a joint enterprise entered into between the parties. I think that joint enterprise ceased as of the time the corporation took over effective control of the partnership and excluded Mr. Siciliano." (R. 459)

The court reaffirmed its informal remarks in the opinion filed on March 2, 1955, wherein the court states:

> "In the court's view, whether this was a partnership or a joint venture, the rights of the parties are governed by Sec. 2432, Civil Code of Guam." (R. 103)

In the final judgment rendered in this cause on April 7, 1955, the court seems to still be following the theory that this was not a formal partnership, since in part (1) of the judgment the court ordered, adjudged and decreed as follows:

> "1. The copartnership or joint venture heretofore existing between Joseph A. Siciliano and American Pacific Dairy Products, Inc., is herewith dissolved as between the parties as of July 1, 1953." (R. 114)

Appellant urges that a finding of no partnership is the correct one.

B. The appellant, a corporation, was not authorized to enter into a partnership agreement under the law of the state of its incorporation.

In the first section of this argument it is established that the law of the place of incorporation determines the powers and purposes of the corporation and that the law of the place of contracting determines whether the parties had capacity to contract and whether a contract was validly formed. Restatement, Conflict of Laws, Sec. 156. The statutes of the State of Washington provide that a corporation has the right to act as a natural person, but only authority to perform such acts as necessary or appropos to its purposes and not repugnant to law. Revised Code of Washington, Sec. 23.08.070. Appellant has discovered no Washington cases construing this section regarding partnerships but the annotation in 80 A.L.R. 1049 is referred to as stating the general rule that a corporation is not authorized to enter into a partnership unless it is expressly set forth in its Articles. See 13 Am. Jur. Partnership, Sec. 823 and 824. See Fletcher Cyclopedia of Incorporations, Sec. 2520; see also Crane Handbook on Partnership, *supra,* Sec. 9 at page 34.

C. The president of the appellant was not impliedly authorized to enter into a partnership agreement, and, therefore, his act required ratification by the board of directors of the appellant.

As is pointed out in Sec. 1 of this Argument, the law of the place of the agency agreement determines the ef-

fect of that agreement and, therefore, the law of the State of Washington determines whether the corporation president was impliedly authorized to enter into a partnership agreement. There is no Washington case directly in point on the power of the president of a corporation to enter into a partnership agreement, but the Washington court has stated that the powers of a corporate president are very limited and an examination of the most pertinent cases would seem to indicate that placing the corporation into a partnership would be beyond the scope of any implied power of the president. See *Reuter Organ Co. v. First Methodist Episcopal Church of Kelso,* 7 Wn.2d 310, 109 P.2d, 798. For a further exposition of this general rule see Fletcher, Cyclopedia of Corporations, Volume II, Sec. 622.

D. The facts of the case at bar lead to the conclusion that the contract of partnership signed by the corporate president was not authorized and that ratification by the board of directors of the corporation was necessary to establish a formal partnership agreement.

The articles of incorporation of American Pacific Dairy Products, Inc., do not authorize the corporation to enter into a partnership arrangement (Defendant's Exhib. "A") (R. 342). This was found also by the trial court (R. 459). There is nothing in the record to indicate that Edward Thompson, the president of the appellant, was authorized by the Board of Directors of the appellant, at any time, to enter into a partnership arrangement with the appellee. The facts of this case establish the contrary position since it is undisputed

that Edward Thompson, president of the appellant, went to the Island of Guam in June, 1952, to direct the operations of opening a Dairy Queen Store, which, at that time, had a manager named Mr. Slaughter (R. 251, 318). The operation at that time did not contemplate the appellant entering into a partnership with anyone, but rather that the store would be operated by an employee of the corporation. This was not changed until Mr. Thompson, the president of the appellant, arrived on the Island of Guam in June, 1952, and was informed by Mr. Slaughter that he would not be able to act as manager, and, therefore, the corporation needed another manager (R. 318). This is found as a fact by the court as shown by its opinion wherein it is stated:

> "As the store was nearing completion in June, 1953 (*Sic* 1952), Edward Thompson again came to Guam and learned that the part-time manager would not be available. As he was impressed by the plaintiff's business ability, he offered, and the plaintiff accepted a 50% interest in the business. Thompson, acting for the defendant corporation, entered into a co-partnership agreement with the plaintiff under the terms of which each partner paid into the partnership $15,000.00 in cash, or other assets." (R. 97-98)

There is nothing in the record to support the court's finding that Edward Thompson, the president of the appellant, was authorized to act for the defendant corporation, but rather the entire record establishes that the appellant at all times considered ratification of the agreement necessary. This is shown by the fact that the *appellee's* attorney corrected the partnership agree-

ments and forwarded them to the United States after making some typographical corrections (R. 329). These papers did not arrive in the United States until after the 16th day of July, and, therefore, the appellant's board of directors would have had no chance to examine or act upon these documents until after the middle of July (R. 329). At this time Mr. Siciliano was absent from the Island of Guam, and, therefore, the board of directors of the appellant did not take immediate action upon the documents until it could be seen whether or not Mr. Siciliano would immediately return to Guam as he had promised (R. 330). The board of directors of the appellant did meet on October 6, 1952, and refused to ratify the partnership agreement but instead stated they would ratify only on the condition that Mr. Siciliano (the appellee) return to the Island of Guam and comply with certain other conditions (Def. Exh. "E") (R. 343). It is admitted by the pleadings that a copy of this resolution was sent to the appellee and received by him (R. 46) (R. 68).

The appellee attempted to show that this ratification was not a valid action of the board of directors by introducing a personal letter written by the president of the appellant to the attorney for the appellee several days after the notice of the board's action was sent to the appellee. This was admitted improperly as plaintiff's Ex. No. 7 (R. 382). This letter, on its face, indicates that it was not an action authorized by the corporation since it states:

> "Last Monday my associates, Herbert Little and George Henrye, while discussing other matters in which we are interested, formally approved that

agreement which I made with Joe Siciliano last June on Guam." (R. 379)

This letter indicates that it was an informal meeting of some of the directors and not all of the directors and was written as a personal letter to the appellee's attorney, who certainly would not have relied on such an informal statement when the resolution had been delivered to his client. It is true that a corporation can be bound by the admissions of its president, but it is Hornbook law that the authority of an agent cannot be established from the mere statements of the agent alone, particularly when they are in direct conflict with the stated actions of the corporation formally established in the minute book and presented to the appellee. See McKelvy, Evidence (Hornbook Series) (1944) at Section 280, p. 506-507. The court did not recognize the principle of the admission of an agent being used to establish his authority, but instead overruled the objection of the appellant's attorney and stated:

"THE COURT: Well, you have the president of the corporation here. Let's forget about this fiction. I think that that letter should be put in evidence." (R. 381)

This was specifically objected to by the appellant on the ground that it was a personal letter written by the witness and was outside of the scope of his authority as president of the corporation, and this objection was noted but overruled (R. 382). The court erred in admitting and using this exhibit to support its judgment and this alone should entitle the appellant to a new trial.

During the period from July 2, 1952, until April 21, 1953, the appellant continually attempted to persuade

the appellee to return to the Island of Guam so that a partnership arrangement might be consummated (R. 328). The trial court made a finding that the appellant made every reasonable effort to induce the appellee to return (R. 100). Mr. Thompson testified that he wrote to the attorney of the appellee that he would attempt to have the October 6, 1952, resolution extended to 90 or 120 days in order to give the appellee a chance to comply (R. 329). Finally, on April 21, 1953, the appellant gave up its attempts to consummate a partnership with the appellee, set forth a background of the situation in a resolution, refused to ratify or go forward with the partnership arrangement and wound up the affairs of the appellant and the appellee by offering to return to the appellee the money he had invested in the business, less any damages which his refusal to go forward might have caused them (Def. Ex. "F") (R. 344). A copy of this resolution and notice of termination was mailed to the appellee and was received by him as admitted by the pleadings (R. 48, 68). The appellant attempted to tender the appellee's money to him but was unable to do so because the appellee's assets were subject to a receivership and the situation was such that no one knew to whom the money should be formally presented (R. 269-270, 385).

The actions of the appellant in this case and all the facts establish that the corporation president was not expressly authorized to enter into a partnership agreement and that both parties were well aware of this fact.

E. The appellant is not estopped to deny that there was no formal partnership agreement.

As is pointed out in the previous section, the appellee's attorney handled this purported partnership agreement and, therefore, the appellee cannot plead ignorance of the law regarding whether Mr. Edward Thompson was authorized to enter into a partnership agreement without ratification by the Board of Directors of the appellant. Certainly the actions of the appellant in sending notice to the appellee and in keeping the appellee's attorney informed of the refusal of the Board of Directors of the appellant to ratify the agreement were not such actions that would cause the appellee to be acting in reliance upon the actions of the corporation or upon any type of apparent authority of the president of the appellant.

F. Even by the law of the Territory of Guam there was no formal partnership agreement.

We have been unable to find any cases of the Territory of Guam concerning the authority of the corporate president to enter into a partnership agreement, and, therefore, we must assume that the law of the territory of Guam follows the general authorities cited previously in this brief to the effect that the corporate president is not impliedly authorized to enter into the partnership agreement.

The statutes of the territory of Guam provide that foreign corporations are held to the same extent as domestic corporations for their acts, except as regards the relationship between officers and the corporation itself. Guam Civil Code Section 408.

There are no cases construing Guam Civil Code on purposes of a corporation but the California cases construing the California Code (Civil Code of California, Section 286) from which the Guam Civil Code was adopted follow the general rule that a corporation cannot enter into a partnership relationship unless expressly authorized by its charter. See *Fee v. McPhee Co.,* 31 Cal. App. 295; *Mervyn Investment Co. v. Biber,* 184 Cal. 682, 194 Pac. 1037; 20 Cal. App. 708, 130 Pac. 165. See also the general authority in 13 Am. Jur. Sections 823 and 830 and 40 Am. Jur. Section 22.

It is, therefore, the position of the appellant that either under the law of the Territory of Guam or the Law of the State of Washington, the president of the corporation must be expressly authorized to enter into a partnership agreement on behalf of the corporation and, further, that a corporation must be expressly authorized to enter into a partnership agreement on behalf of the corporation and, further, that a corporation must be expressly authorized by its charter to enter to a partnership agreement. The facts of this case establish that the president of the appellant was not authorized to enter into the partnership agreement and that the powers of the corporation did not include the right to enter into a partnership agreement. Therefore, it is necessary that the action of the corporate president be ratified by the Board of Directors of the corporation, even under the Law of Guam in order to enter into a partnership arrangement.

G. Since no formal partnership was consummated there was a joint venture or *de facto* partnership at will between the parties June 23, 1952.

The appellant is not urging in this case that it can, as a corporation, avoid any partnership liability imposed upon it under a theory of *ultra vires* action or lack of authorization of the corporate president. The appellant's position is that if a relationship was established it was an informal joint venture or partnership at will between the parties and that the rules applying to informal partnerships at will or joint ventures should be applied in this case, and, therefore, the trial court erred in referring to the formal partnership agreement for a division of profits or method of termination.

III.

The Joint Enterprise of the Parties Was Dissolved on July 1, 1952, by the Appellee's Breach and Was Wound Up on April 21, 1953, by the Appellant

A. The appellant is willing to meet its just obligations to the appellee due to his reliance on the appearance of a partnership arrangement.

As pointed out in Part I of this brief, the law of the Territory of Guam governs the effect of the actions of the appellant as a foreign corporation operating on Guam. Restatement, Conflict of Laws, Sec. 166, comment (c). The Guamanian law governing foreign corporations states that any foreign corporation lawfully doing business in Guam shall be bound by all the laws, rules and regulations applicable to domestic corporations of the same class except as to creation of the corporation or the internal relationships of stockholders,

directors and officers to the corporation, and to each other. Guam Civil Code, Section 408.

The law governing the domestic corporations on Guam provides that no enumeration in the Articles of the corporation shall have effect as a limitation upon the actual authority of the representatives of the corporation, and the corporation can be held liable as a partner to prevent injustice. Guam Civil Code Sec. 355.

The appellant's position is that there was no partnership agreement in this case but that the appellant can be held to have caused the appellee to rely upon a partnership at will or joint venture type of relationship and, therefore, to prevent injustice it can be said that a joint venture or partnership at will came into existence on June 23, 1952, when the appellee signed certain agreements with the president of the appellant and placed $15,000 in the hands of the appellant's president.

B. The joint venture or partnership at will was dissolved by the appellee's breach of his promises on July 2, 1952.

The trial court found as a matter of fact that the appellee and the impression left with the appellee by the appellant's president was that the appellee should devote his "skill and energy" to the best interests of the business of the partnership (R. 98). The court also found that the appellee was needed to manage the store and for his ability to manage it he was to be given a chance to invest $15,000 in the business and receive a 50% interest (R. 99).

The trial court in this case found as a matter of fact

that the appellee reached his agreement on July 1, 1952 (R. 103) and forced the appellant to protect itself by taking over the partnership assets (R. 108). The court found that after making every reasonable effort to induce the plaintiff to return the appellant took over the business and operated it to the complete exclusion of the plaintiff (R. 108). The court also found as a conclusion of law that the partnership of the parties was terminated by the exclusion of the appellee because of his breach and acquiescence in such exclusion (R. 113). The court also found that the partnership of the parties was dissolved by the exclusion of the appellee, because of his breach, but fixed the date of dissolution as of July 1, 1953, instead of July 1, 1952, when the appellee actually left the Island of Guam (R. 102, 112-114).

The court found that the plaintiff breached his agreement as of July 1, 1952, and this could have caused appellant damage though none was shown (R. 99-101, 103, 108).

The findings of the court that the plaintiff breached his agreement are amply supported by the weight of competent evidence and are not challenged by the appellant. The appellee's own testimony establishes that under the terms of the agreement he was to be manager of the business, and that 8 or 9 days after it opened he left the Island of Guam and was gone for approximately two years, during which period he did not at any time return (R. 148-149).

The appellant does not challenge the findings of fact of the lower court, but rather the application by the

trial court of the law to these facts. The trial court, in its opinion and later judgment, stated that the rights of the parties were governed by Section 2432 of the Guam Civil Code (R. 103). The court then stated that it would use the cases of the State of California to determine the effect of the Civil Code of Guam, since the Civil Code of Guam was taken from the Civil Code of California, with the probable express purpose that the decisions of the Supreme Court of the State of California could then be used as a background in the deciding of cases arising on the Island of Guam. *United States v. Johnson* (C.A. 9) 181 F.2d 557 (1950). The trial court properly stated that whether this is a joint venture, partnership at will or formal partnership, the rights of the party should be decided under the Uniform Partnership Act which applies to joint ventures as well as partnerships. *Zeibak v. Nasser,* 12 Cal.2d 1, 82 P.2d 375.

The appellant urges that it is, from this point on, that the trial court erred in its application of the Uniform Partnership Act as adopted on Guam because the trial court failed to distinguish between dissolution and winding up of partnership at will. The appellant has been unable to find any Guamanian cases discussing the Uniform Partnership Act which is Guam Civil Code Sec. 2395-2472, and will, therefore, refer extensively to the California decisions rendered under identical sections of the California Civil Code.

The trial court ignored the provisions of the Uniform Partnership Act which provide:

> "The dissolution of a partnership is the change in the relationship of the partners caused by any partner ceasing to be associated in the carrying on

as distinguished from the winding up of the business." Guam Civil Code, Sec. 2423.

This is to be distinguished from the winding up of the partnership affairs which is stated:

"On dissolution the partnership is not terminated, but continues until the winding up of partnership affairs is completed." Guam Civil Code, Sec. 2424.

This distinction between dissolution which establishes the rights of the parties in the partnership and the final termination or winding up of the business which finally distributes the assets is fundamental.

In *Fisher v. Fisher,* 83 Cal.App.2d 357, 359, 188 P. 2d 802, 804, it is stated:

"Throughout this case respondent has confused the dissolution of a partnership with the liquidation of its affairs. . . . After dissolution liquidation of the partnership follows. It does not usually precede dissolution, and because the affairs of the partnership are not entirely liquidated, and some bills remain unpaid and some property is not divided, cannot overcome satisfactory evidence of dissolution. Dissolution represents the demise of a partnership and liquidation the settlement of the estate."

See also *Shearer v. Davis,* 67 Cal. App.2d 878, 155 P.2d 708; *Meherin v. Meherin,* 93 Cal. App. 459, 209 P.2d 36.

There seems no doubt that a partner abandoning the business or ceasing to carry on his duties with respect to the business causes a dissolution thereof at that time and he cannot remain silent. As is stated in *Beck v. Cagle,* 46 Cal.App.2d 152, 162, 115 P.2d 613, 619:

" . . . the abandonment or dissolution of a part-

nership or joint venture may take place by conduct inconsistent with its continuance. . . .

"A person may not withhold his claim awaiting the outcome of an enterprise, and then, after a decided turn has taken place in his favor, assert his interest, especially where he has thus avoided the risks of the enterprise. Accordingly, if the property involved is of a speculative or fluctuating character, more than ordinary promptness is required of a claimant; he must press his claim at the earliest possible time. * * * "

See also *Richards v. Plumbe,* 116 Cal.App.2d 132, 253 P.2d 126, and *Middleton v. Newport,* 6 Cal.2d 57, 56 P.2d 508.

C. Even if the appellee had not breached his agreement causing a change in relationship in partners and a dissolution the appellant dissolved the relationship by notice.

As was pointed out in Section II of this brief, there was no formal partnership between the parties, and, therefore, this is a joint venture or partnership at will. Even under the terms of the agreement proposed by the appellee there is no definite term of partnership stated and, therefore, this could be dissolved lawfully at any time by the express will of either party. Guam Civil Code Sec. 2425 (1) (b). *Vogler v. Ingrao,* 123 Cal.App. 2d 341, 266 P.2d 826; *Burke v. Chrostowski,* 287 P.2d 805; *Maryland Casualty Co. v. Little,* 102 Cal. App. 205, 282 Pac. 968. This is well stated in the case of *Fisher v. Fisher,* 83 Cal.App.2d 357, 188 P.2d 802, 803, 804, wherein it is stated:

"The case of *Maryland Casualty Co. v. Little* (citations omitted) is as stated: 'If there is no time

> prescribed by agreement for the duration of a general partnership, it may be totally dissolved by the expressed will of any partner. Section 2450 Civil Code (citations omitted). After the dissolution of a partnership one partner cannot create any new obligation in the name of the partnership. Sections 2458, 2462, Civil Code. . . . The partnership may be dissolved by agreement of the partners, or the will of one of them, where there is no fixed term of its existence. Such agreement, or the will of one, may be proven by all the circumstances of the case as well as by direct evidence. Complete cessation of partnership business and a division of all, or a major portion of its assets, without any objection, express or implied, is strong evidence of an agreement to dissolve, if not explained or refuted, it is sufficient to force the conclusion of a dissolution by agreement." (Citations omitted)

It is admitted by the pleadings that the appellant sent to the appellee a notice on October 6, 1952, informing the appellee that it would not enter into a partnership agreement with him unless he met certain conditions (R. 46 and 68). It is also admitted in the pleadings that a notice was sent to the appellee effectively settling the partnership as of April 21, 1953, and tendering to the appellee or the receiver for the appellee in the action of *Siciliano v. Siliciano,* the amount of the appellee's capital investment (R. 48 and 68). This type of termination is often done and dissolution occurs at the time the will of the party is exercised if not in controversion of the partnership agreement. *Fisher v. Fisher, supra; Vogler v. Ingrao, supra; Burke v. Chrostowski,* 287 P.2d 805.

Therefore, the appellant urges that the partnership

at will or joint venture existing between the parties due to the responsibility of the appellant toward the appellee because of its president's actions was dissolved as of July 1, 1952, by appellee's breach of its terms and by appellant's notice.

D. The silence of the appellee acted as an acquiescence in the dissolution of the partnership and the later termination.

A partner owes a duty to his partners to give notice of the acceptance or rejection of their offers of termination. This is well set forth by the California Supreme Court in the case of *Wood v. Gunther,* 89 Cal.App.2d 718, 201 P.2d 874. This provided that plaintiff might sell her interest to the remaining partners. They made an offer, either to pay $45,000 for her interest or to have her interest evaluated according to the contractual formula, as she might elect. She remained silent for nearly three months and then advised one of the partners to come to her home where he was served with a copy of the Summons and Complaint in that action. The court in stating she had accepted the offer of termination stated at p. 730:

> "The law does not permit you to play fast and loose in situations where one owes a duty to another. This is not the case of a stranger offering to buy her interest. . . . To such a person she would owe no duty to speak at all, but in this case she was one of the three fiduciary partners in a firm of persons who had a contract with one another, under which they owed duties, one to the other; and, consequently, silence made the acceptance."

See also *Meherin v. Meherin,* 93 Cal.App.2d 459, 209

P.2d 36; *Pacific Atlantic Wine, Inc., v. Duccini,* 111 Cal.App.2d 957, 245 P.2d 622.

E. The termination of the partnership agreement is not contemporaneous with the dissolution and was done without court intervention.

There is no doubt that dissolution can be complete even though the business is not immediately liquidated. *Fooshe v. Sunshine,* 96 Cal.App.2d 336, 215 P.2d 66.

It is not required that there be a division of the profits and the assets of the business immediately upon dissolution. *Fisher v. Fisher, supra; Shuken v. Cohen,* 179 Cal. 279, 176 Pac. 447; 20 Cal. Jur. 804 at Sec. 102. A partnership can be terminated or wound up informally without intervention of the court. *Griffeth v. Fehsel,* 61 Cal.App.2d 600, 607, 143 P.2d 522.

As is stated in Crane on Partnerships, Chap. 8, Section 78:

> "It is safer for a partner having a cause for dissolution, by reason of the co-partner's misconduct or breach of agreement, to petition a court for a decree of dissolution and accounting. But if he proceeds to exercise self help in such a situation, and excludes the erring partner or dissolves by notice, he is not liable for damages for his justifiable recision of the partnership agreement." Citing *Schnitzer v. Josephthal,* 122 Misc. 15, 202 N.Y.S. 77 (1923), affirmed 208 App. Div. 769, 202 N.Y.S. 952; *Reiter v. Morton,* 96 Pa. 229, 240 (1880).

This is also provided for in the Guam Civil Code which provides for a dissolution under Section 2423 of the Guam Civil Code and for a series of causes of dissolu-

tion under Section 2425 and then separately provides in Section 2426 for dissolution by decree of court.

The termination and the tender of the appellant effective April 21, 1953, was sufficient as a tender and the silence of the appellee for a period in excess of 18 months was an acceptance of this tender and termination since the strict rules of tender need not be observed when a relationship such as that which existed between the parties is present. *Pacific-Atlantic Wine, Inc., v. Duccini,* 111 Cal.App.2d 957, 245 P.2d 622; *Meherin v. Meherin, supra; Wood v. Gunther, supra.*

The appellant was entitled to use the firm name of the *de facto* partnership after dissolution because this was an asset belonging to the appellant prior to the forming of the partnership and as the surviving partner the appellant was entitled to use this name to continue the business. *Speka v. Speka,* 124 Cal.App.2d 181, 268 P.2d 129.

F. The court erred in its method of determining the amount to which the appellee was entitled after dissolution.

There would seem to be no doubt that the appellant had the right to wind up the partnership since it was not the party who wrongfully dissolved it and there was no agreement as to the partnership duration. Guam Civil Code, Section 2431.

The appellant managed the affairs of the *de facto* partnership from the time of dissolution, on July 1, 1952, until termination effective April 21, 1953, at which time the appellee was tendered his capital investment.

The trial court in this case used Section 2432 of the Guam Civil Code in conjunction with the California case of *Zeibak v. Nasser, supra,* but did not properly apply Guam Civil Code, Section 2432, which provides as follows:

> "(c) a partner who has caused the dissolution wrongfully shall have: . . .
>
> "II. If the business is continued under paragraph (2) (b) of this Section the right as against his co-partners and all claiming through them in respect of their interests in the partnership to have the value of his interest in the partnership less any damage caused to his co-partners by the dissolution, ascertained and paid to him in cash, or the payment secured by bond approved by the court, and to be released from all existing liabilities of the partnerships; but in ascertaining the value of the partners' interest in the value of the good will of the business shall not be considered."

The effect of the court's failure to recognize the difference between dissolution of the partnership and termination of the partnership or winding up caused the trial court to grant to the plaintiff a return of his capital, an amount for capital improvements paid out of profits made after the date of dissolution, the value of a building built after the date of dissolution and one-half of the net profits, most of which were earned after the date of dissolution (R. 112). The court, in its judgment, does not refer to the dissolution of July 1, 1952, nor to the termination of April 21, 1953, but refers only to a court decree of dissolution as of July 1, 1953, which the court determined was a date of dissolution.

The appellee was entitled only to have the value of his

partnership interest as of the date of actual dissolution of the business which was July 1, 1952, only nine days after the business had been started and in ascertaining the value, the value of good will of the business should not be considered. Guam Civil Code, Section 2432 (2) (c) II, *supra*. There was no indication of profits in this nine-day period, and, therefore, the appellee was entitled to a return of his capital investment less any damage suffered by the appellant for the appellee's breach of the agreement and without any amount for goodwill. This was tendered to the appellee in the termination effective April 21, 1953, which was sent to the plaintiff. See Exhibit E attached to the complaint (R. 59-67, 68).

IV.

The Appellee Was Entitled to No Profits or at Most Only a Pro Rata Share of the Profits Earned After Dissolution and Before Termination

The facts of this case establish that at the time of the opening of the Dairy Queen Store, the appellant had a paid-in capital of $43,600.00 (R. 189). The total investment of the appellant in the Dairy Queen Store on Guam, when it opened on June 22, 1952, was approximately $42,500.00 (R. 193). It is undisputed that this amount of money was devoted to the business and American Pacific Dairy Products, Inc., the appellant, has never paid any salaries to any of its employees or dividends to its stockholders or expenses in any manner other than to the Dairy Queen of Guam except for the legal expenses of incorporating (R. 325-326). It is also undisputed that the appellee paid $15,000.00 for his in-

terest in the proposed partnership (R. 323). The money which Mr. Siciliano, the appellee, gave to the appellant, was used immediately in the business. It was not repaid by the business to the appellant until October, 1952 (R. 144-145, 323). Therefore, as of June 23, 1952, the appellee had $15,000 invested in the business and the appellant had $42,500.00 invested in the business.

This situation is confused in the record by the discussions concerning the proposed partnership agreement between the appellee and Edward Thompson, the president of the appellant. The appellee refused to accept the appellant's investment as a basis for the value of the Dairy Queen assets (R. 266-267). Therefore, the proposed agreement included such things as the appellant's investment being arbitrarily reduced from $42,-500 to $38,000; the appellant carrying $8000 of the investment as an account payable, to be paid only from profits, the appellant's franchise cost wasn't used as a factor (R. 445) and appellant immediately loaned $7500.00 of the money received from appellee to the business (R. 266-268). The big element in all of these concessions by the appellant was the appellee's management (R. 266-268). The best way, therefore, to establish the proportionate contributions of each party is to take the total investment of each party. It is undisputed that the total investment of the appellant in the Dairy Queen on June 22, 1952, was approximately $42,500.00 and that all of the assets of the corporation were invested in the Dairy Queen of Guam (R. 193). It is also undisputed that the appellee invested $15,000 in the business.

A. Appellee is not entitled to share in the profits earned after dissolution.

Some cases have held that during the period between dissolution and final termination of the partnership a partner may not have a right to any of the subsequently earned profits. As is stated in 40 Am. Jur. Partnerships, Section 382:

> "The fault or bad faith of a partner may affect his right to an accounting of subsequently earned profits. Accordingly, it is held that a partner who has refused to cooperate in effecting an equitable division of the business and assets, and has rejected all offers of settlement, or has failed to supply his share of capital, or has withdrawn his capital from the firm may be denied any interest in the profits subsequently earned."

The same principle has been applied when there has been a dissolution of the firm through an abandonment of the business by one partner. As is stated in 40 Am. Jur., Partnerships, Section 383:

> "Where the dissolution of the firm is effected through the abandonment of the business by one partner it has been held that such partner is not entitled to share to the subsequently earned profits. This rule has been applied even where the other partners used the complainant's property in the business.
>
> "On the other hand, there is some authority for the view that a partner does not forfeit his right to share in subsequently earned profits by his abandonment of the business or venture. There may be circumstances under which a partner's refusal to continue the venture is justified, in which case he should not be deprived of his right to share in the subsequently earned profits."

The appellee breached his contract on July 1, 1952, and subsequent to that time refused to co-operate or even answer appellant's letters of inquiry. The appellee did not even reply to appellant's notice of termination. By the facts of this case the appellee is not entitled to any profits earned subsequently to July 1, 1952.

B. If the appellee is entitled to any profits he would be entitled to an apportionment according to the capital invested during the period from July 1, 1952, until dissolution on April 21, 1953.

The trial court erred in this case by not recognizing the dissolution on July 1, 1952, and apportioning subsequently earned according to the original *de facto* partnership agreement. This was improper as is pointed out in 40 Am. Jur., Partnerships, Section 387, wherein it stated:

> "In several cases the courts, without considering what would be the most equitable way to apportion the subsequently earned profits, and apparently without realizing that there might be some other method of apportionment, have divided the profits according to the terms of the original partnership articles, allowing the partner whose assets have been used after dissolution a full share, without regard to the extent to his interest in the capital of the concern. In those cases which have considered the matter, however, it has been uniformly held that the subsequently earned profits are not to be divided according to the terms of the original partnership articles, but are to be apportioned according to the respective capital investments of the partners."

See also 40 Am. Jur., Partnerships, Sec. 386; Annot.,

80 A.L.R. 12, at page 58, Sec. VI. The above-cited annotation has recently been cited with favor and the above rule reaffirmed in the case of *Moseley v. Moseley,* 196 F.2d 663, 665, at Note 1 (C.A. 9, 1952).

The California cases on this point follow the rule that a retiring partner is only entitled to his pro rata or proportionate share of the profits earned after dissolution. *Burke v. Chrostowski,* 287 P.2d 805; *Nuland v. Pruyn,* 99 Cal.App.2d 603, 222 P.2d 261; *Hall v. Watson,* 73 Cal. App.2d 735, 167 P.2d 210; *Painter v. Painter,* 4 Cal. Unrept. Cases 636, 36 Pac. 865, Reaffirmed 6 Cal. Unrept. cases 677, 65 Pac. 135, and *Ruppe v. Utter,* 76 Cal. App. 19, 243 Pac. 715.

Therefore, the appellee should have been entitled to $15,000 divided by ($42,500 plus $15,000) or 26% of the profits during the period from July 1, 1952, until April 21, 1953, when the business was terminated, the appellee was tendered his money and the appellant took over complete operation of the firm. This amounted to 26% of $30,823.04 or $8,013.99.

The total amount to which appellee would be entitled under this theory would be:

Capital contribution	$15,000.00
26% of net profits	8,013.99
Total	$23,013.99

V.

The Appellee Is Not Entitled to Interest on the Amount of the Judgment from July 1, 1953, to April 7, 1955

The trial court found that the appellee was entitled to interest on the amount of his capital contribution

plus interest on the profits earned to July 1, 1953, from July 1, 1953, to the date of the entry of the judgment (R. 114). The ordinary rule is that a partner settling up partnership affairs after dissolution is not subject to interest unless his conduct has been so inequitable as to give rise to a demand for interest. 40 Am. Jur., Partnerships, Section 364. This rule has been followed in the recent California case of *Speka v. Speka,* 124 Cal.App.2d 181, 268 P.2d 129.

As has been previously pointed out in this brief, the appellant tendered to the appellee in good faith the amount which the appellant considered due the appellee on April 21, 1953. The trial court found that the appellee accepted the termination and expulsion by acquiescence (R. 113). Any delay in the settlement of the appellee's rights to obtain his capital investment or profits to that date, if he believed they were due to him, is the fault of the appellee in not questioning the termination of the partnership and the amount tendered to him and not that of the appellant who, in good faith, tendered to the appellee the amount it believed due and owing to him. *Meherin v. Meherin, supra; Wood v. Gunther, supra.*

VI.

Even If the Trial Court's Theory of Law Had Been Correct, the Court's Computation of the Date of Termination Was Not Supported by the Facts.

The trial court found as a matter of fact that the appellant took full control of the business as of July 1, 1953 (R. 102, 112). As has been previously pointed out in this brief the court improperly characterized this as a dissolution.

It is admitted by both parties in the pleading that the appellant sent the appellee a notice of termination and tender of his capital investment effective April 21, 1953 (R. 46-47, 68). It is undisputed from the testimony that the new manager of the appellant, Norman Thompson, arrived on Guam on April 22, 1953, and immediately took charge of the operation by posting the books and obtaining the key to the cash register and informing the employees of his position (R. 388, 394, 413-417). The court based its Finding of Termination as of July 1, 1953, on the fact that it took the appellant from the date of Norman Thompson's arrival on the island of Guam until July 1, 1953, to establish the books of the appellant on a corporate basis (R. 425-426) and upon the testimony of Edward Thompson, the president of the appellant, that he had sent to the appellee, prior to the notice of termination, some letters indicating that Norman Thompson might help the appellee with his corporation and work with the appellee's employees (R. 445-447). This letter of Mr. Thompson was prior to the notice of termination and was, of course, prior to the taking over of the operation on April 21, 1953, and it is uncontroverted that no reports or other information were given to the appellee or a position inconsistent with the complete termination taken after the 1st of May, 1953 (R. 447).

The acts of the appellant acting by and for itself to correct its books had no relationship to the appellee. It, therefore, could not be in any way construed as entitling the appellee to profits for the months of May and June, 1953. The profits, as shown from the books, on April 30, 1953, were $30,823.04 (R. 214). The profits

to May 1, 1953, were $31,403.47 (R. 214). There was no profit figure for the period ending June 30, 1953 (R. 214). The court established an arbitrary figure of net profit for the month of June, 1953, of $2,350.00 (R. 111). The court using this $2,350.00 figure calculated a total undistributed profit as of July 1, 1953, of $33,-753.49 (R. 110-111).

This means that the court improperly allowed the appellee one-half of $2,930.45 ($1,465.22) as profits earned after the termination of the business, even if the appellee was entitled to share 50-50 in the profits during the termination period (which appellant maintains he was not).

VII.

Even If the Trial Court's Theory of Law Had Been Correct, Judgment Was Improperly Computed Based on the Facts. And Appellant Was Denied a Fair Trial in Establishment of Figure

The trial court's computation of the judgment appears in Statement of Facts and Record, p. 112.

A. Appellant was denied a fair trial by trial court's refusal to order an audit and its refusal to notify the appellant on the filing of its findings of fact and conclusions of law.

The court stated to counsel that he would suggest that they get together with the court and agree upon an accountant to establish the accounting in this matter unless counsel were willing to accept a formula as representing a basis of July 1, 1953 (R. 487). The court reserved the right to appoint a satisfactory accountant if the parties could not agree on one (R. 489). In the

interlocutory judgment entered May 2, 1955, the court decreed as follows:

> "6. That unless the parties within five days of the date hereof agree upon a mutually satisfactory accountant to audit the books of the defendant, that the court will thereafter appoint such an accountant to perform such audit." (R. 95-96)

The court then went on to provide that the appellant should produce all of its books, papers and records for the purpose of facilitating the accounting herein provided for (R. 96). The court did not ever appoint an accountant and entered its supplemental findings of fact and conclusions of law and final judgment on April 7, 1955, without having appointed an accountant and without giving the appellant notice of the entry of the findings of fact and conclusions of law and judgment or a chance to object to the entry of the judgment without having an accountant examine the books. This final judgment was based upon the figures of Henry Diza, plus an arbitrary figure of $2,350.00 for the month of June, 1953, as created by the court (R. 14805, p. 110-111). The appellant submits this was arbitrary and unfair since an audit of the books would have revealed many such errors and would have enabled the court ed out in the sections of the brief which follow this one.

B. Even if the court correctly determined the termination date and method of computing profits of the partnership, the judgment was incorrectly computed by the court.

Item (a)

With reference to the trial court's computation of the judgment (R. 112) appellant admits item (a) Return of Capital.

Item (b)

Item (b) should not have been granted to the appellee. This item represents the account payable which American Pacific Dairy Products, Inc., took from the purported partnership in return for contributing $8,000 worth of assets to the Dairy Queen. This figure was not reflected in the profits earned but was part of the contribution of the appellant to the partnership. Profits as reflected on books and given by appellee to the court were not reduced by $8,000 in order to repay this account. The court, by granting the appellee this $4,000 gave the appellee $4,000 over and above the net profits to which he was entitled on the theory that the $8,000 had reduced profit figure. Obviously, profits were not so reduced on the books because the balance sheet reflecting a reduction of cash and a reduction of accounts payable did not in any way diminish the income statement showing net profits which was used to establish the court's profit figure (R. 209-215, 222-223, 281).

Item (c)

The $1,150.00 figure under item (c) is incorrect because it is payment for a building which was never ordered by the appellant or the purported partnership, and the court is in effect forcing the appellant to purchase this building as an asset and, therefore, pay the appellee one-half of its value.

Item (d)

The figure of $16,876.75 as the net profit computed in item (d) represented one-half of the profits as taken

from the books of Henry Diza and extrapolated by the court to the extent of $2350 for the month of June, 1953, as pointed out previously. Therefore, this net profit figure is incorrect for the month of June, 1953, even if the books of Henry Diza are accepted as correct and the appellant is held until July 1, 1953, since the profits of the business were diminishing in this period (R. 213-214) and yet the court treated the profit margin as being an average over the entire period of operation (R. 111).

Pacific Enterprise Judgment

The trial court erred in its computation of the amount to be deducted for the judgment obtained by Pacific Enterprises, Inc., against the purported partnership. It was determined that the claim of Pacific Enterprises, Inc., was $7,600.83 and the court subtracted from that $1,066.28, leaving a net of $6,523,55 (R. 235). The sum of $1,066.28 was a set-off for supplies which were sold to appellee's corporation by the Dairy Queen. The court reduced the amount of the appellee's corporation's claim by this amount, which meant that this amount of $1,066.28 was taken into profit and shown as a part of the profits to be divided between appellee and appellant, and yet this was used to pay an expense of the Dairy Queen which should have been reflected on the books to reduce the net profits. This means the sum of $1,066.28 appears twice in the judgment in that it increases the profit figure and decreases the expense figure with the result that the appellee receives one-half of $1,066.28 or $533.14 to which he is not entitled even if the trial court's theory of the case is accepted.

VIII.

PACIFIC ENTERPRISE SUIT

The whole account of the appellee is not adequately proven but the account of the appellee, as allowed by the court, shows only four items are in dispute.

See Appendix "A" for a compilation of the account demanded and the amount granted by the court.

For the bills of the appellee Pacific Enterprises, Inc., see Record 14806, pages 4 and 5. For a summary of the amounts agreed to and the computation of the judgment see Record 14806, pages 225-236.

The items which are in dispute between the parties and appealed by the appellant are as follows:

Item IV—Rent for reefer truck	$ 400.00
Item XI—Load of crushed coral	24.11
Item XII—Equipment owned by Pacific Enterprises, Inc.	180.30
Building Addition (including cess pool)	2,300.00
Total	$2,904.41

A. The four items not agreed to by the appellant should be denied *in toto* as the appellant's books do not support the account.

The entire account as rendered by the appellee demonstrates that the charges contained therein were not adequately recorded, and were in most costs padded.

For example the bookkeeper of the appellee testified that he was not instructed to set up charges on the appellee's books for the reefer truck (Item IV), subsistence and housing facilities (Items I and II), and part

of the supplies issued to the Dairy Queen (Item X), until this suit was in preparation in August, 1954, sixteen months after the last of these services were rendered (R. 14805, p. 299). The bookkeeper admitted that he went back to his books and *antedated* the entries but that some items such as subsistence, which was only estimated (Item I), housing (Item II), supplies (Item (X), and Warehouse (Item VII), still do not appear on the appellee's books as a charge against the Dairy Queen (R. 14805, 300-301).

The appellee's bookkeeper testified that the maintenance items such as electrician's time and reefer mechanic's time (Item IX) were not charged to a Dairy Queen account (R. 14806, p. 167-170). The trial court established by testimony of Diza, the bookkeeper, and admission of appellee's counsel that the supplies delivered to the Dairy Queen (Item X) were not contained on charge slips issued to the Dairy Queen but only on delivery slips, part of which represented a delivery of supplies to the Dairy Queen of the Dairy Queen's own stock (R. 14806, 173-175). The appellee's counsel admitted this was not a proper way to keep books (R. 14806, p. 175-176).

Some items of the claim could not be identified by the appellee's own employees who were supposed to have prepared the charges. For example, the employees could not account for the slimline (Item II) (R. 14806, p. 14, 149, 177) and the mulch paper (Item X) (R. 14806, p. 7, 111) which were included on the bill.

The trial court stated and the appellee's counsel admitted that the bookkeeping procedures of the appellee

did not reflect the true situation between the parties in the absence of later agreements (R. 14805, p. 302-304).

The appellant urges that the entire account is not supported by the evidence and that the four items not agreed to by the appellant in open court should not be allowed to stand since the entire account is nothing more than a rough guess not supported by the evidence.

B. The evidence does not support a finding that the appellee is entitled to recover for the materials and services listed in Items IV, XI and XII.

Item IV representing the rent for a reefer (refrigerator) truck was allowed by the court to the extent of $400.00 (R. 14806, p. 225-226). This was based on the testimony of Joseph Meggo, an employee of the appellee who testified that in his opinion the truck was needed to store ice cream for the rush periods (R. 14806, p. 107-109). This was flatly contradicted by Mr. Edward Thompson, president of the appellant, who testified that there was ample storage space without using the refrigerator truck (R. 14806, p. 195, 200, 201). The trial court concluded from the testimony of appellee's employees that there was no disadvantage to the appellee in having its refrigerator truck connected and running because the truck has to be kept cold anyway (R. 14806, p. 138, 225). The trial court did not use a figure established by the appellee or by appellant's evidence, but rather made an arbitrary allocation of $400.00 to this item (R. 14806, p. 225-226). The sum of $400.00 was improperly granted to the appellee.

Item XI in the sum of $24.11 represented two loads of crushed coral which appellee's employee testified was

used for the foundation and to fill in around the building (R. 14806, 113). This employee couldn't remember a date or time (R. 14806, p. 114). The appellant's president testified that the appellant had already paid $1100.00 for crushed coral for the building and this additional coral was not ordered by and was of no benefit to the appellant (R. 14806, p. 67).

Item XII:

Item XII in the sum of $180.30 demonstrates the lack of evidence supporting the appellee's claim and the padding of the account (R. 14806, p. 8).

First, a ¾ h.p. Westinghouse motor was allowed at $70.00 which was the new invoice price (R. 14806, p. 179, 229), yet appellee's employees testified this was a rebuilt motor (R. 14806, p. 120). The appellee's employees testified that this motor was installed in the walk-in refrigerator (R. 14806, 116-117, 120); the appellant's manager testified there was not a ¾ h.p. motor anywhere in the store (R. 14806, p. 217). The trial court stated with regard to Item XII as follows:

> "THE COURT: 'Equipment owned by Pacific Enterprises, Inc., No. XII—well, you are not too far off on this. The ¾ h.p. motor I think there could be—subsequent to its installation—there could be some error on that. I think it ought to be clear if there is a Westinghouse motor in the walk-in.'
>
> MR. BOHN: I understood that there was some testimony—
>
> THE COURT: I think Norman testified it was a 2 h.p. You have the voucher. I think the probability is that you have something and I am going to allow that. I think it must be there. The condenser

is unquestioned, isn't it? The blower—where do we come out on that?" (R. 14806, p. 228)

There seems no doubt that the court established that figure without sufficient evidence of its use or its price.

The hot fudge heater and the deep freeze are typical examples of a padding of an account and the appellees took these items back so that the appellant was not charged with them. However, to show the entire improper computation of the appellee's bill, it should be pointed out that the hot fudge heater was billed to the appellant for the sum of $101.00. Mr. Edward Thompson testified that Mr. Siciliano's hot fudge heater was second hand and produced in court a larger new hot fudge heater which appellant bought for $19.78 (R. 198). The deep freeze was not used by the appellant once it took over the store and was returned to the appellee at the time of trial (R. 218).

The air-conditioning system was a case wherein the appellant established an air-conditioning system, had it removed by the appellee with fans substituted and then was charged by the appellee for repair of the air-conditioning system. These are the items listed in Item XII as the Universal condenser, blower, air cooler, evaporator, and electric fans. Mr. Edward Thompson, the president of the appellant, testified that they had the sales room air conditioned for a charge of over $1,000.00 and then, when the appellant's manager, Norman Thompson, came to the Island of Guam, he found only electric fans operating and had to spend an additional $250.00 to $300.00 repairing the air conditioning (R. 14806, pages 68-69). This testimony is not chal-

lenged or contradicted in any way. The electric fans were returned to the appellee (R. 14806, p. 69).

It is also uncontradicted that the employees of the appellee took the blower and the air-cooled evaporator which constituted the air-conditioning system and substituted equipment of their own (R. 229). The testimony of the appellee's employee is that they took out the blower and the other air-conditioning equipment and that it is still in the possession of the appellee. The apparent reason for the change was that the air cooler evaporator did not bring in cold air (R. 14806, pp. 118-119). The appellee never returned any of this air-conditioning equipment of the appellant and these items, as allowed by the court, were improper (R. 14806, pp. 229-231). The court also allowed the appellee to collect for a carrier compressor listed in XII. Mr. Thompson testified that this was the same compressor put in originally since it was painted by the man who put it in and is still there (R. 14806, p. 229). The appellee's testimony is that a compressor was changed in the walk-in reefer but that a carrier compressor was only used to help out on air conditioning. Yet, on the same page of the record, the appellee's employee stated that a carrier compressor was installed in the reefer (R. 14806, p. 120). There seems no doubt that the appellee's employee was confused as to the installation of a carrier compressor.

C. The appellant was improperly charged with the cost of a building placed on partnership property.

The trial court allowed the appellee the sum of $2,300.00 for a building which appellee's employee built

on the Island of Guam (R. 14806, p. 233). The court's figure was not based on quantum merit, nor on the testimony of any of the witnesses but rather upon what the court determined was a reasonable value (R. 14806, pp. 234-235).

The appellee claimed the amount of $2,361.96 as the cost of the original store (R. 14806, p. 5). Therefore, the court granted almost the entire bill of the appellee though be broke down the cost of the building into $1,-500.00 for the building and $800.00 for a cesspool (R. 14806, pp. 234-235). The charges listed by the appellee in its bill were in many instances proven to be inconsistent or incorrect. For example, with regard to the amount charged for labor, the manager could not remember the names of the employees and he could not remember how many men worked there on any one day (R. 14806, pp. 163-164). With regard to the materials, the amount of cement was put in as 95 bags at a cost of $223.25 and yet the appellant's own foreman testified that they did not use 95 bags, but at the most, only about 50 or 60 bags (R. 14806, pp. 150-151). The appellee carried the entire building on its books at a value of $861.16 (R. 14806, p. 205).

The appellee did not carry this item as an account owing by the Dairy Queen to Pacific Enterprises, Inc., on its books, but, instead, carried it as an asset account under the heading of buildings on the Pacific Enterprise books (R. 14806, pp. 207-208, pp. 210-211). This amply demonstrates that the building was built as an asset for the appellee and not for the appellant, and that the cost, as established by the court, was highly inflated.

D. The appellant did not order this building and at all times has rejected any claim to it.

The building is referred to by the president of the appellant in the case of *Joseph Siciliano v. American Pacific Dairy Products, Inc.,* where he testified that he knew nothing of the construction of the building until he got a letter from the Fuller Glass Company in San Francisco, indicating that Mr. Siciliano, the president of the appellee, had ordered glass like the previous glass ordered but that the bill be sent to his post office box address on Guam rather than to the president, in Seattle (R. 14805, p. 339). Mr. Meggo, an employee of the appellee, testified in the first case that this building was to be used for additional freezers and as an extension of the Dairy Queen store (R. 14805, p. 183). Mr. Thompson, the president of the appellant, pointed out that the building could not be used as an extension for the Dairy Queen of Guam because the waste pipe was missing, there was no conduit to bring electricity to the freezers, there was no 220 V. line coming into the store, there was a 30 amp fuse box when 60 amps were needed, where the freezer should have been it was too close to the sales window, and a sink was roughed-in at the place where the freezers would have had to be placed (R. 14805, pp. 339-340). Mr. Thompson, in the second suit, testified first and reiterated his opinion that the addition was built by Mr. Siciliano for use as a snack bar and that he only found out about the building because of the phone call of Fuller & Company (R. 14806, pp. 72-74). Mr. Thompson, the president of the appellant, testified that they did not order the building; that they did not want the building, and that

he told Mr. Siciliano they did not want it, but since Mr. Siciliano informed him that it was open and operating there was nothing they could do about it (R. 14805, pp. 75-76).

The court established through questioning of Mr. Edward Thompson and made comment that in the court's opinion the operation of an ice cream dispensary attracts a different kind of trade than a snack bar trade (R. 14805, p. 79).

When Mr. Joseph Siciliano testified, he contradicted the testimony of his employee, Mr. Meggo, and stated that the building was constructed for the sale of root beer, popcorn, sandwiches, and milk, and Mr. Siciliano, in his statement, after hearing Edward Thompson's testimony, referred to the court's comments about a different type of trade (R. 14805, pp. 85 and 90-91), and then testified this was to be a type of milk bar (R. 14806, p. 91).

Mr. Siciliano admitted that this building was going to be paid for with Pacific Enterprise money (R. 14806, pp. 93-94).

This building was constructed so that there was no entrance between the old Dairy Queen building and there still is no connection between them without leaving the back door of one and going into the back door of another (R. 14806, pp. 165-189).

This building was later moved into by Mr. Norman Thompson, the manager of the appellant, and painted to match the rest of the store and repaired so that it would not be such an eyesore and could be used for the personal residence of Norman Thompson (R. 14805, p.

341). The manager of the appellant, Mr. Norman Thompson, did not do this until 1954 and he was informed by the president of the appellant, Edward Thompson, that the appellant, American Pacific Dairy Products, Inc., claimed no interest in the building and that any repairs of the building would be at Mr. Norman Thompson's own risk just as it was at the risk of Mr. Siciliano (R. 14805, p. 341; R. 14806, p. 211). This building has been used by the manager of American Pacific Dairy Products, Inc., during this period but the appellant is not required to supply quarters to its manager and the actions of its manager in using this building were entirely at his own risk (R. 14805, p. 341; R. 14806, pp. 80-81).

IX.

The Trial Court Erred in Denying Appellant's Demand for Jury Trial

It has been established by numerous decisions that the Constitution does not follow the flag into unincorporated territories. *Downes v. Bidwell,* 182 U.S. 244, 287, 21 S.Ct. 770, 45 L.Ed. 1088; *Balzac v. People of Porto Rico,* 258 U.S. 298, 42 S.Ct. 343, 66 L.Ed. 627. The Territory of Guam has not been incorporated into the U.S. and it has been stated as dicta that since Guam has not been incorporated into the U.S., neither Section 2 of Article III, relating to trial by jury, nor the 5th, 6th or 7th amendment relating to pettit juries have any application on the Island of Guam in the absence of some Act of Congress extending an application there. *Pugh v. United States,* 212 F.(2d) 761 (C.A. 9th, 1954).

The appellant urges that the doctrine that the Constitution does not follow the flag has become outmoded due to recent social and political developments involving the rights of United States citizens abroad and, therefore, that the court re-examine the doctrine that residents of the United States operating in United States territories are not entitled to the protection of the Constitution of the U.S. It is understandable that the rights and protections offered to the citizens and persons residing in the U.S. cannot be applied in foreign territories to which the sovereignty of the U.S. does not extend but it seems only right and just that the protection of the United States Constitution should extend to Americans operating in territories of the United States which are subject to United States sovereignty.

A. The trial court erred under the statutes of the U.S. governing procedure on Guam in not granting appellant the right to a jury trial.

The Organic Act of Guam, Aug. 1, 1950, c. 512, Sec. 5, 48 U.S.C. Section 1421b, contains a "Bill of Rights" for Guam but contains no provision for trial by jury. However, Section 22 of that act, as set forth in 48 U.S.C. Section 1424, which creates the District Court of Guam and defines its jurisdiction, provides in subsection (b) for the rules to be followed by the District Court of Guam as follows:

> "The rules heretofore or hereafter promulgated and made effective by the Supreme Court of the U.S. pursuant to Section 2072 of Title 28, in civil cases; * * * shall apply to the District Court of

Guam and to appeals therefrom. August 1, 1950, c. 512 § 22, 64 Stat. 389."

The legislative enactment authorizing establishment of the Rules of Civil Procedure for the District Courts, as contained in 28 U.S.C., Section 2072, provides:

> " * * * Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution."

The Federal Rules of Civil Procedure, as established by the Supreme Court of the U.S., establish the right of trial by jury in Rule 38 of the Rules of Civil Procedure, Title 28 U.S.C. as follows:

> "Rule 38a *Right Preserved.* The right of trial by jury as declared by the 7th Amendment to the Constitution or as given by a Statute of the U.S. shall be preserved to the parties inviolate."

Therefore, it is established that not only do the Federal Rules of Civil Procedure, which are in effect in the District Court of Guam, established that the right to jury trial is preserved as a procedural right but this right was specifically declared to be preserved by Act of Congress.

The above reasoning as applied to the Federal Rules of Criminal Procedure has been directly upheld by this court in the case of *Pugh v. U.S.,* 212 F.(2d) 761 (C.A. 9th, 1954), which was appealed from the District Court of Guam.

B. The appellant properly demanded a jury trial under Federal Rule of Civil Procedure, Section 38, in Cause No. 14806 on February 9, 1955 (R. 240) (R. 39).

The time for filing a demand for jury trial is within 10 days from the filing of the last pleading directed to the issue. When there are co-defendants this is 10 days after the filing of the answer of the last co-defendant as to issues of joint liability. *Spiro v. Pennsylvania R.* Co., 3 F.R.D. (1942). In the case of *Pacific Enterprises v. American Pacific Dairy Products, Inc.,* and *Joseph Siciliano,* the co-defendant, Joseph Siciliano, did not file an answer to the complaint prior to February 9, 1955, and, therefore, the appellant American Pacific Dairy Products, Inc., was not required to file its demand for jury trial until after the answer of its co-defendant Joseph Siciliano had been filed.

X.

The Court Abused Its Discretion in Denying Appellant's Motion for a Change of Venue and Motion for a Continuance and Thus Prevented the Appellant from Having a Fair Trial in Both Cause 14805 and Cause 14806

The appellant filed a motion for a change of venue on the ground of convenience of the parties and witnesses and in the interest of justice in both causes (R. 14805, p. 32; R. 14806, p. 17). This motion was supported by affidavits of Norman Thompson and Fenton J. Felan, Jr., establishing that the officers of the corporation maintained their records and business in Seattle, Washington, and that the records and books of account of the appellant were maintained in that area and that the

majority of the witnesses for the defense and other records were situated in the City of Seattle. The court denied this motion and the matter moved rapidly to trial. The appellant was unable to obtain some of its records, and, therefore, on February 9, 1955, moved for a continuance which was the first and only continuance requested by either party (R. 14806, p. 240). This was denied by the court and the matter was tried on February 17, 1955. It was brought out at the trial that the defendant did not have some of its records available for the reason that they had not arrived from the United States though they had been mailed a considerable period of time prior to the trial (R. 14805, pp. 215-218). The appellant was not able to produce some of these records since they did not come from the United States in time, and, therefore, appellant was denied a fair trial through the court's refusal to change the venue of this action or grant a continuance to the appellant.

XI.

The Appellant Was Denied a Fair Trial in Cause 14806 [*Pacific Enterprises, Inc., v. American Pacific Dairy Products, Inc.*, and *Joseph Siciliano*] Since the Same Attorneys Represented Both Plaintiff and One of the Defendants

The attorneys representing Joseph Siciliano in both of these actions were John Bohn and Robert E. Duffy. These attorneys represented the plaintiff Pacific Enterprises, Inc., in Cause No. 14806. The defendant moved for a severance of the trials of *Joseph Siciliano v. American Pacific Dairy Products* and *Pacific Enterprises, Inc., v. American Pacific Dairy Products, Inc.,*

and Joseph Siciliano because of this representation by the same attorneys of both sides of one of the cases (R. 14806, pp. 40-41). This was denied by the trial court.

To show the difficulty with which the appellant was faced the co-defendant Joseph Siciliano in Cause No. 14806 did not file an answer and was very hostile to the defense of the appellant and since the same attorneys represented both the plaintiff and the defendant in this case the appellant was unable to properly present its defense. The appellant, therefore, urges that if the cause is not reversed for the grounds stated previously in this brief, that the court grant a new trial to the appellant in Cause No. 14806 on the ground that appellant did not receive a fair trial since the same attorneys represented both the plaintiff and one of the co-defendants in Cause No. 14806.

CONCLUSION

We submit the trial court's decisions are erroneous in both Cause No. 14805 and Cause No. 14806 and that the decisions should be reversed with instructions to the court below to reduce the judgment in Cause No. 14805 from $34,376.95, plus interest, to $15,000, and that the judgment in Cause No. 14806 be reduced from $6,534.55 to $3,630.14.

Respectfully submitted,

LITTLE, LESOURD, PALMER, SCOTT & SLEMMONS,
BROCKMAN ADAMS,
Attorneys for Appellants.

1510 Hoge Building,
Seattle 4, Washington.

Little LeSourd Pal
Scott & Slemmons

APPENDIX "A"

	Bill of Mar. 31, '54	*Bill of Aug. 1, '53*	*Amount Allowed by the Court*
I Subsistence	$ 975.85	$ 2,031.30	$ 2,996.15
II Housing	67.30	398.00	465.30
III Transportation		600.00	.....
IV Rent for reefer truck		1,012.50	400.00
V For hauling supplies		146.25	146.25
VI Delivery of Supplies to Dairy Queen		146.25	146.25
IV For storage of supplies		361.70	315.00
III For freezing		77.00	75.00
XI For maintenance		616.07	344.34
X For Supplies Issued to Dairy Queen from Pac. Enterprise own stock		160.02	27.16
XI Other expenses		24.11	24.11
XII Equipment owned by Pac. Enterprise, Inc.		771.60	180.30
III Other Salaries	90.00	3,966.65	90.00
Employee advances, Balmonte	130.20		90.97
ost of Additional Store			
[Labor		1,433.44	
[Materials Used		1,928.52	
			$ 2,300.00
otal Owing	$1,263.35	$13,673.41	$ 7,600.83
ess Mdse. bought from Dairy Queen		1,066.28	1,066.28
	$1,263.35	$12,607.13	$ 6,534.55

No. 14,805

United States Court of Appeals

For the Ninth Circuit

AMERICAN PACIFIC DAIRY PRODUCTS, INC., a Corporation,

Appellant,

vs.

JOSEPH A. SICILIANO,

Appellee.

JOSEPH A. SICILIANO,

Appellant,

vs.

AMERICAN PACIFIC DAIRY PRODUCTS, INC., a Corporation,

Appellee.

OPENING BRIEF OF JOSEPH A. SICILIANO, CROSS-APPELLANT AND APPELLEE.

JOHN A. BOHN,
P. O. Box 771, Agana, Guam,
WALTER S. FERENZ,
903 First Street, Benicia, California,
Attorneys for Cross-Appellant and Appellee.

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No. 14,805

United States Court of Appeals
For the Ninth Circuit

American Pacific Dairy Products, Inc., a Corporation,	*Appellant,*
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vs.	
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OPENING BRIEF OF JOSEPH A. SICILIANO, CROSS-APPELLANT AND APPELLEE.

STATEMENT OF PLEADINGS AND JURISDICTION.

This is an action for the dissolution of a partnership organized and operating under the laws of the territory of Guam. The Amended Complaint in the action, set forth in full beginning on Page 25 of Volume I of the Transcript of Record, was filed in the

District Court of Guam pursuant to Section 62 of the Code of Civil Procedure of the territory of Guam which gives jurisdiction to the District Court in this cause by virtue of the fact that the assets of the partnership which is the subject of the action exceed the sum of Two Thousand Dollars ($2,000.00).

Upon judgment being entered for the plaintiff in the action, the same was appealed to this Court. The United States Court of Appeals for the Ninth Circuit has jurisdiction to hear an appeal from the final judgment of the District Court of Guam. (28 U.S.C.A. Sections 1291 and 1294.)

STATEMENT OF CASE.

Plaintiff and the defendant executed a partnership agreement for the operation of a business in Guam on the 23rd day of June, 1952. Said agreement is set forth in full as Exhibit A to plaintiff's amended complaint and the text thereof appears beginning on page 8 of Volume I of the Transcript of Record. The parties also executed on June 23, 1952, a supplemental agreement providing for additional details of the partnership operation, and the full text of this supplemental agreement appears in Volume I of the Transcript of Record beginning at page 51 where it was set forth as Exhibit B to the defendant's answer. The execution of these agreements is admitted by both parties. Plaintiff invested the amount of money required by the agreement and otherwise fully performed the terms thereof.

The plaintiff, Joseph A. Siciliano, is an individual but is also the dominant stockholder of a corporation operating in Guam known as Pacific Enterprises, Inc., which owns, manages and operates a bakery, a restaurant, a farm and a luxury restaurant also utilized as a night club. Plaintiff's corporation has also had experience in owning and operating ice cream manufacturing plants, cafeterias and snack bars.

The defendant is a corporation organized under the laws of the State of Washington, but solely for the purpose of doing business in the territory of Guam and other Pacific islands. It qualified to do business as a foreign corporation in the territory of Guam and executed the copartnership agreement as such corporation. Some effort was made by the defendant to avoid its obligations under the partnership contract on the ground that it was a corporation and not authorized to execute partnership agreements. However, this effort was characterized by the trial court as a "fiction" (Transcript of Record, Volume I, page 100) in view of the fact that the defendant took full advantage of the benefits of the contract and in view of the generally accepted rule that a corporation may be held liable as a partner to prevent injustice, as well as the general rule that transactions of this sort will be adjudged joint ventures wherein the parties have the same rights and liabilities of partners. The trial and the judgment of the court, therefore, proceeded under the statutes of Guam pertaining to partnerships.

The basic facts in the case are for the most part not seriously controverted, it appearing that almost

immediately after the execution of the partnership agreement the president of the defendant corporation left Guam for his home in Seattle, Washington. The plaintiff, Joseph A. Siciliano, with the help of his managers and technicians employed by Pacific Enterprises, Inc., undertook the management and operation of the business known as the "Dairy Queen of Guam" which was primarily engaged in the manufacture and sale of ice cream products. There was a wealth of evidence as to the difficulties in undertaking a business of this character in the then-existing situation in Guam, but it appears sufficient to state here that the difficulties were largely overcome and the business operated at a very substantial profit during all of the time it was under the control of the plaintiff or the plaintiff's management personnel. The ice cream store actually opened on June 22, 1952 (one day before the actual execution of the partnership agreement which, however, had been agreed upon and was being reduced to writing concurrently with the physical efforts of the parties to open the business to the public). Plaintiff transferred trained personnel from his own corporation to the partnership business and with the aid of his management personnel, who remained upon the payroll of his corporation at no expense to the partnership, worked at the ice cream store during its first critical days and placed it in full operating condition.

After approximately ten (10) days plaintiff left the territory of Guam, leaving the operation of the ice cream store in charge of his corporate management

personnel, who were then and at all other times material to this action paid salaries by Pacific Enterprises, Inc. Plaintiff did not return to Guam for approximately two (2) years but directed his affairs in the territory through the management personnel of his corporation by correspondence and telephone calls with his personnel. Plaintiff thus provided at his own expense and not at the expense of the partnership trained supervision of the partnership business during all times that the same was under his control.

Management of the partnership ice cream store continued under the supervision of plaintiff's personnel until May 1953. It is admitted by all parties that gross sales as of May 31, 1953, were Ninety-one Thousand Eight Hundred Six Dollars and Sixty-seven Cents ($91,806.67) and the net profit for the same period was Thirty-one Thousand Four Hundred Three Dollars and Forty-seven Cents ($31,403.47). (These figures are derived from a series of monthly reports submitted from Guam to the president of defendant corporation in Seattle and admitted by him to be correct.) During this period minor purchases were made in Guam but substantially all of the money taken in by the business was sent to the president of the defendant corporation in Seattle. In fact, the evidence shows that at least One Hundred Eighteen Thousand Nine Hundred Seventy-nine Dollars and Forty-four Cents ($118,979.44) was sent to Mr. Edward Thompson, president of the defendant corporation in Seattle from Guam. (Transcript of Record,

Volume I, page 207.) No money of any kind was ever paid to the plaintiff, and he has received nothing from the partnership nor from any transaction involving the partnership. (Transcript of Record, Volume I, page 206.)

In April 1953 the son of the president of the defendant corporation came to Guam, ostensibly to aid plaintiff's employees in keeping records of the partnership business, as well as to assume other employment with plaintiff's corporation. However, after the son had become familiar with the details of the operation of the partnership business, he and his father arranged matters so that he took over complete control of the ice cream store operated by the partnership so that, as found by the trial court (Transcript of Record, Volume I, page 102), as of July 1, 1953, the defendant had taken full and complete control of the partnership business and excluded the plaintiff from all participation therein. Furthermore, although the reports were admittedly accurate as of May 31, 1953, the business was under the management of the son of the president of defendant corporation in June 1953 and no report of the activities of the business during that month was ever produced at the trial.

Also, as of July 31, 1953, the president of the defendant corporation rewrote the records of the partnership business, reflecting as of that date only a total gross sales of Ninety-one Thousand Two Hundred Ninety-eight Dollars and Seventeen Cents ($91,-298.17) (Transcript of Record, Volume I, page 223) which is slightly less than the admittedly correct gross

sales as of May 31, 1953. The president of defendant corporation sought to explain this discrepancy by saying that he had rearranged the figures to reflect the period September 1, 1952, to July 31, 1953, instead of to reflect the cumulative sales and profit from the beginning of the operation of the business. No explanation was given as to why this was done and no reconciliation was presented to account for sales and profits from the additional months omitted from this July 31, 1953, statement. No satisfactory accounting or audit was made by the defendant to the plaintiff or to the court for the period beginning May 31, 1953, but such figures as are available indicate that the business made much less money under the defendant's management than it did under the management of plaintiff.

Defendant continued its sole and exclusive operation of the partnership business to and including the date of the trial and as a result of the judgment of the trial court continues such management of the business, fully excluding the plaintiff therefrom and from all participation in the net assets and the profits thereof. Furthermore, the defendant admits that it took all of the partnership funds and placed the same in the defendant's bank account. (Transcript of Record, Volume I, page 238.) In short, the defendant took all of the assets of the partnership, placed the same in its own name and continues to hold and keep the same as its own. Furthermore, some of the profits and funds of the partnership business, after they were placed to the defendant's bank account, were used by

the defendant for the benefit of a competing corporation known as Guam Frozen Products, Inc. (Transcript of Record, Volume I, page 239.) At least Twenty-six Thousand Seven Hundred Forty Dollars and Sixty-three Cents ($26,740.63) was turned over to this competing corporation, the majority of stock of which is owned by the defendant. This competing corporation constructed and operates a business using the designation "Dairy Queen", selling identical products in competition with the store established by the copartnership. Supplies are freely interchanged between the two businesses and in external physical appearance the two are indistinguishable. Also, Norman Thompson, son of Edward Thompson, president of the defendant corporation, continues to act as manager of the partnership store at a salary of Five Hundred Dollars ($500.00) per month while also managing the competing store at a salary of One Hundred Dollars ($100.00) per month. Testimony further indicated that the president of the defendant corporation has been flying to and from Guam, presumably in connection with the business of one or both of these stores, and it is unknown as to how much of his traveling expenses are being charged to either of them. Whether still further funds have been diverted by the defendant corporation into other ventures is unknown to plaintiff.

In substance, the trial court found most of the foregoing facts to be true but held that plaintiff had breached the partnership contract by failing to be physically present on Guam to personally supervise

and operate the ice cream store on Guam instead of delegating the same to his management personnel. The court found that no damage had occurred as the result of such breach, and the plaintiff prevailed as to his share of the profits of the partnership business up to July 1, 1953, but was not allowed profits thereafter nor any share of the assets of the partnership business, except the return of his original investment. To support this conclusion the trial court stated that "* * * the parties dissolved their partnership as between themselves on July 1, 1953, and that plaintiff's interest should be determined as of that date * * *." (Transcript of Record, Volume I, page 108.) These conclusions, plaintiff believes, are in error and, hence, although receiving a money judgment in the court below, has appealed from portions of the judgment.

SPECIFICATIONS OF ERROR.

Joseph A. Siciliano, plaintiff in the court below and cross-appellant and appellee herein, respectfully submits that the lower court erred in the following particulars:

I.

The lower court erroneously held that the partnership agreement between the parties hereto required the plaintiff to be physically present in Guam, and based upon such interpretation, held that the plaintiff breached the agreement by his absence from Guam.

II.

The lower court erred in failing to hold that the defendant breached the partnership agreement as of July 1, 1953, when it excluded plaintiff from participation in the partnership business and took unto itself all of the partnership profits and assets.

III.

The lower court erred in holding that the partnership was dissolved as of July 1, 1953, instead of the date of the court order dissolving the same (February 18, 1955).

IV.

The lower court erred in failing to order a complete accounting of the affairs of the partnership during the period they were directed by the defendant.

V.

The lower court erred in failing to require a winding-up of the partnership business under the control of a receiver and the sale and/or distribution of its assets to the parties.

VI.

The lower court erred in awarding plaintiff only the return of his original investment, plus interest, plus a share of the profits to July 1, 1953, and by failing to allow plaintiff a share of the profits subsequent to July 1, 1953, and a share of the tangible assets of the partnership business.

VII.

The lower court erred in failing to appraise the value of the good will of the partnership business and to award the same to the plaintiff as innocent party to the dissolution.

ARGUMENT.

I. THE LOWER COURT ERRONEOUSLY HELD THAT THE PARTNERSHIP BETWEEN THE PARTIES HERETO REQUIRED THE PLAINTIFF TO BE PHYSICALLY PRESENT IN GUAM, AND BASED UPON SUCH INTERPRETATION, HELD THAT THE PLAINTIFF BREACHED THE AGREEMENT BY HIS ABSENCE FROM GUAM.

The contract does not purport to require the plaintiff to manage the partnership business. It requires him to devote only such time as may be actually agreed upon between the copartners, and there is not a scintilla of evidence that any agreement was ever entered into to require him to devote any time at all to management. The agreement does clearly state that during the period that he shall act as manager he shall receive a specified salary. However, even if the agreement had required him to perform management services, such agreement would have been fully performed by the comprehensive management provided by his management employees who were under his direction and who were never in any way compensated by the partnership. Certainly, there is nothing in the agreement which requires the plaintiff, a man of substantial business affairs, to remain physically present in the territory of Guam to conduct the affairs

of this partnership which was merely the sale of ice cones and mixes.

A. The lower court concluded, as a matter of law, that the partnership was dissolved "* * * by exclusion of the plaintiff because of his breach and acquiescence in such exclusion as of July 1, 1953." (Transcript of Record, Volume I, page 113.)

Plaintiff argues that the partnership agreement, Sections 7, 8 and 13 in particular (Agreement set out in full in Transcript of Record, Volume I, page 8, et seq.), did not create a contractual duty on the part of plaintiff to assume the managership of the partnership business. Rather, it is only provided therein that plaintiff is entitled to a salary if he shall act as manager, and it further provides that "Second partner (plaintiff) agrees to devote such time, as may be mutually agreed upon between copartners, together with his skill and energy * * *". (Section 8 of Articles of Copartnership, Transcript of Record, Vol. I, p. 10.)

Plaintiff contends that there is no evidence indicating such agreement was ever reached. Therefore, plaintiff was not bound to manage the partnership business. In *Autry v. Republic Productions, Inc.* (1947), 30 Cal. (2d) 144, 151, 180 P. (2d) 888, where that plaintiff's contract contained a similar provision agreeing to agree in the future, the court held that such a contract cannot be made the basis of a cause of action, even though, as a part of an undisputed contract, it will be given the effect that the parties intended.

Plaintiff asserts that while it is uncontroverted that he did assume managerial control, there is no evidence to show that the parties agreed, in writing or by conduct, that he, plaintiff, should remain physically present on Guam while acting in such capacity.

In the process of interpreting a contract it is not the proper function of the court to alter the contract or add meaning that is not evident in the wording. (*Vierra v. Shaffer* (1952), 113 C.A. (2d) 768, 248 P. (2d) 992; *Nourse v. Kovacevich* (1941), 42 C.A. (2d) 769, 109 P. (2d) 999.)

Plaintiff contends the lower court did read in and add to the partnership agreement the requirement that plaintiff act as manager. In its memorandum opinion of March 2, 1955 (Transcript of Record, Vol. I, p. 96, 102) the court said as follows:

> "* * * It is inconceivable that if the plaintiff was not obligated to manage the business that no provision would have been made for the appointment of another manager."

The partnership agreement clearly and unambiguously provides that plaintiff could act as manager and, if so, would receive extra compensation. The lower court's contrary finding in its memorandum opinion (Transcript of Record, Vol. I, p. 102) that the agreement was uncertain and ambiguous is not binding upon this Court. (*Brant v. California Dairies, Inc.* (1935), 4 Cal. (2d) 128, 48 P. (2d) 13; *Wachs v. Wachs* (1938), 11 Cal. (2d) 322, 79 P. (2d) 1085.)

Based upon such error, the lower court held that the plaintiff caused the dissolution by failure to re-

main on Guam and manage the partnership business. Plaintiff contends the agreement is explicit in that no managerial duty is placed in his hands but that it is optional with him, and, therefore, plaintiff did not breach the agreement by his continued absence from Guam.

B. Even if it is assumed that plaintiff was under a contractual duty to act as manager of the partnership business, plaintiff contends said duty was fully performed by him under any concept of the nature of the agreement in that:

(1) The agreement does not specifically require that plaintiff devote his personal attention or services alone nor is a managership of business of this type one that customarily precludes delegation of performance to agents and employees, and

(2) In any construction of the agreement it is contended that by defendant's failure to take positive action in objecting to plaintiff's management of the business by delegation of such duties to his agents and employees and by accepting the benefit of such performance, the defendant has waived any rights that it may have by virtue of plaintiff's absence from Guam.

Section 160 (3) and Section 162 (2) of the Restatement of the Law of Contracts states the general rule. The applicable portions of these sections are as follows:

"Section 160. Delegation of Performance of a Duty or a Condition. * * *

(3) Performance or offer of performance by a person delegated has the same legal effect as performance or offer of performance by the person named in the contract, unless,

(a) performance by the person delegated varies or would vary materially from performance by the person named in the contract as the one to perform, and there has been no such assent to the delegation as is stated in Section 162, or

(b) the delegation is forbidden by statute or by the policy of the common law, or

(c) the delegation is prohibited by contract."

"Section 162. Assent to Assignment of a Right or to Delegation of a Duty as Precluding Subsequent Objection. * * *

(2) If such assent is manifested after the creation of a contract, the assent is similarly effective if it is given for sufficient consideration or the facts are such that an informal promise would be binding, or if, in reasonable reliance on the manifestation, a material change of position takes place."

Also, Sections 2304 and 2349 of the Guam Civil Code (*California Civil Code* Sections 2304 and 2349) provide in full as follows:

"Section 2304. What Authority May Be Conferred. An agent may be authorized to do any acts which his principal might do, except those to which the latter is bound to give his personal attention."

"Section 2349. Agent's Delegation of Powers. An agent, unless specially forbidden by his principal to do so, can delegate his powers to another person in any of the following cases, and in no others:

1. When the act to be done is purely mechanical;
2. When it is such as the agent cannot himself, and the subagent can lawfully perform;
3. When it is the usage of the place to delegate such powers; or,
4. When such delegation is specially authorized by the principal."

The law of partnership has been said to be a branch of the law of agency. (See *Swan v. Smith* (1929) 102 C.A. 541, at 544, 283 P. 829.) It is generally conceded that the functions, duties, rights and liabilities of the partners in a great measure comprehend those of agents. (See *Berringer v. Krueger* (1924), 69 C.A. 711, 232 P. 467; *Furlow Pressed Brick Co. v. Balboa Land and Water Co.* (1921), 186 C. 754, 267 P. 114.)

The Uniform Partnership Act, Section 9 (1), apparently follows the common law in this regard. (Codified as Section 2403 (1), Guam Civil Code, and Section 15009 (1), California Corporations Code.) (*MacLeod v. Foxwest Coast Theatre Corp.* (1937), 10 Cal. (2d) 383, 74 P. (2d) 276; *Refinite Sales Co. v. Bright Co.* (1953), 119 C.A. (2d) 56, 258 P. (2d) 1116.)

Section 2403 (1), Guam Civil Code, provides as follows:

> "Section 2403. Partner, Agent of Partnership as to Partnership Business. (1) Every partner is an agent of the partnership for the purpose of its business, and the act of every partner, including the execution in the partnership name of any instrument, for apparently carrying on in the usual way the business of the partnership of which he is a member binds the partnership, unless the partner so acting has in fact no authority to act for the partnership in the particular matter, and the person with whom he is dealing has knowledge of the fact that he has no such authority. * * *"

However, the sole management of a partnership may by agreement be vested in one partner. (*McAlpine v. Miller* (1908), 104 Minn. 289, 116 N.W. 583; 68 C.J.S. 576.) A manager or a partner has been held as possessing power to appoint third persons as agents, or employees, to conduct partnership business. (*State Compensation Ins. Fund v. Industrial Accident Commission* (1933), 28 C.A. (2d) 474, 82 P. (2d) 732.) It has also been held that where the only resident partner is obliged to be absent for a time, he may employ a general agent without consulting the others. (*Bank of North America v. Embury, N.Y.* (1861), 33 Barb. 323, 21 How. Pr.)

Thus, it may be concluded that applying the law of contracts, partnership, and agency to the situation as presented here, any duties assumed by plaintiff were performed by delegation to his agents and employees. There is nothing in the agreement which indicates that plaintiff's physical presence is manda-

tory, nor is there any express or implied prohibition contained therein against delegation of managership duties. There is no statute or law preventing such delegation, and, in addition, there is no evidence that the performance actually rendered by plaintiff's agents and employees was materially different from that which was expected from plaintiff. (See Restate., Contracts, Section 160 (4), supra; see also *LaPue v. Groezinger* (1890), 84 C. 281, 24 P. 42.)

In addition, plaintiff contends that the operation of the business by his agents and employees produced a substantial profit, and although defendant apparently was dissatisfied with plaintiff's extended absence, no action was taken by defendant to assume active control of the management until April 1953, some ten (10) months after plaintiff had assumed the task of management. During this period defendant accepted the benefits of the operation of the business and has thereby waived any rights it may have under the agreement.

In summation, the partnership agreement clearly and unambiguously provides that plaintiff is to devote such time as may be mutually agreed upon. No such agreement was ever reached, and, therefore, plaintiff was not bound to remain in Guam and did not breach the partnership agreement, or any other agreement, by his absence.

In addition, whatever obligations plaintiff did assume were performed by plaintiff through his agents and employees. Defendant knew this and failed to manifest a timely objection. Plaintiff was never noti-

fied to return to Guam or be held in breach by defendant. Defendant accepted the substantial profits made by the firm during the period of plaintiff's absence and thereby should be deemed to have waived whatever objection it had to plaintiff's absence.

II. THE LOWER COURT ERRED IN FAILING TO HOLD THAT THE DEFENDANT BREACHED THE PARTNERSHIP AGREEMENT AS OF JULY 1, 1953, WHEN IT EXCLUDED PLAINTIFF FROM PARTICIPATION IN THE PARTNERSHIP BUSINESS AND TOOK UNTO ITSELF ALL OF THE PARTNERSHIP PROFITS AND ASSETS.

The trial court held that defects in current management warranted the defendant in assuming management control of the business. However, regardless of whether the defendant was warranted as an equal partner in assuming management of the partnership business, its activities thereafter amounted to a clear breach of the partnership contract. Taking possession of all of the partnership assets and money, failing to account to the plaintiff, diversion of funds, rewriting the books and creating adverse interests by financing competing businesses are clearly in violation of the contract and of partnership principles.

Plaintiff does not contend that the defendant had no right to assert its voice in the control and management of the partnership business, even though the operation was, prior to such assertion, a financial success. However, plaintiff respectfully contends that the trial court erred in holding in its Conclusions of Law, filed April 7, 1955, as part of the final judgment

(Transcript of Record, Vol. I, pp. 110, 113), that plaintiff acquiesced to his exclusion from the partnership.

Plaintiff believes rather that all the evidence shows a breach by defendant of the partnership agreement, and the findings based upon such evidence were made to that effect, but the trial court erred in failing to conclude as a matter of law that defendant wrongfully breached the partnership agreement.

In support of the above, the lower court in its Memorandum Opinion at page 100 of the Transcript of Record, Volume I, states that:

> "* * * the defendant indulged in what the court characterized as a 'fiction' and attempted to nullify the agreements upon the ground that its board of directors had not ratified them. The defendant took full advantage of the services being performed by Pacific Enterprises, Inc., (plaintiff's corporate enterprise) and accepted the benefits of a successful operation * * *"

The lower court also found as a fact that as of July 1, 1953, the defendant took full and exclusive control of the business, established its own books, reflecting ownership as a corporate asset of defendant, and completely excluding plaintiff as a partner as of that time. (Transcript of Record, Vol. I, p. 102.)

In its supplemental findings of fact, filed April 7, 1955, the lower court also found that the defendant used capital and profits of the partnership business

to invest in a competing business named Guam Frozen Products, Inc., which was competitive to the partnership. (Transcript of Record, Vol. I, p. 112.) The evidence shows, from the testimony of defendant's president, that defendant took approximately seventy per cent (70%) of the capital stock of this competing business in its own corporate name. (Transcript of Record, Vol. II, p. 265.)

Based upon the above, plaintiff contends that the dissolution should be decreed because of his wrongful exclusion from participation in the partnership business and relies upon the following authority: *Zeibak v. Nasser* (1938), 12 Cal. (2d) 1, 82 P. (2d) 375; *Gorman v. Russell* (1860), 14 Cal. 531; *Thompson v. Langton* (1921), 51 C.A. 142, 196 P. 103; *Mills v. Williams* (1925), 113 Ore. 528, 233 P. 542; *Beller v. Murphy* (1910), 139 Mo. App. 663, 123 S.W. 1029.

In addition, the dissolution should be based upon the wrongful diversion by defendant of partnership capital and profits into a competing business to the exclusion and detriment of plaintiff and the partnership. Guam Civil Code Section 2415 (1) provides as follows:

> "Section 2415. Partner Accountable as a Fiduciary. (1) Every partner must account to the partnership for any benefit and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use by him of its property.
>
> (2) * * *"

It would appear indisputably that such breaches of the fiduciary relation are proper grounds for dissolution and an accounting. Guam Civil Code Section 2416 (c) provides as follows:

> "Section 2416. Right to An Account. Any partner shall have the right to a formal account as to partnership affairs:
>
> (a) * * *
>
> (c) As provided by Section 2415,
>
> (d) * * *"

The cases uniformly support this contention. (*Llewelyn v. Levi* (1909), 157 Cal. 31, 37, 106 P. 219; *Dennis v. Gordon* (1912), 163 Cal. 427, 125 P. 1063; *Donleavey v. Johnston* (1914), 24 C.A. 319, 141 P. 229.)

Plaintiff contends there is no evidence that even suggests that he acquiesced to his exclusion from participation in the partnership or that he agreed that the partnership should be terminated without an accounting and settlement of his interest therein. Plaintiff's only acquiescence was to the assumption by defendant of dominant control, but this cannot, in fact or in law, be construed as an intent to abandon or relinquish the business in favor of the defendant. (See *Lanpher v. Warshauer* (1915), 28 C.A. 457, 152 P. 933; *Carrie v. Cloverdale etc., Co.* (1891), 90 Cal. 84, 27 P. 58; *Bernheim v. Porter,* 2 Cal. Unrep. 349, 4 P. 446.)

In the *Lanpher* case, supra, the plaintiff there had agreed to build and construct dwellings using defend-

ant's capital, both to share the profits. The defendant contended that the plaintiff lost his rights to an accounting by failing to continue the building operation. However, the court stated on page 460, that a partnership is not dissolved by the failure on the part of one member in some respect to perform his duty or obligation to it, or that he loses thereby his rights to an accounting and settlement by a court of equity.

Certainly, plaintiff's relinquishment of management control should not constitute grounds for dissolution or amount to an abandonment of his rights, as an innocent partner, in equity.

Although the lower court concluded as a matter of law in its conclusions of law that plaintiff had acquiesced to his exclusion (Transcript of Record, Vol. I, p. 113), since the record fails to contain any evidence to support this finding, it should be overruled by this Court. (*Robinson v. Bowe* (1934, 8th Cir.), 73 Fed. (2d) 238; *Crawford v. Southern Pacific Co.* (1935), 3 Cal. (2d) 427, 429, 45 P. (2d) 183; *Boss v. Sugarland Industry* (1931, 5th Cir.), 50 Fed. (2d) 65.)

III. THE LOWER COURT ERRED IN HOLDING THAT THE PARTNERSHIP WAS DISSOLVED AS OF JULY 1, 1953, INSTEAD OF THE DATE OF THE COURT ORDER DISSOLVING THE SAME (FEBRUARY 18, 1955).

The applicable law in the case at bar is the Guam Partnership statute, derived from identical statutes in California, and is the Uniform Partnership

Act. Under these circumstances a partnership for a fixed term is not dissolved by an act in contravention of the partnership by an order of court, the act merely giving rise to a cause of action. In the instant case the act in contravention of the partnership was by the defendant, yet the judgment of the court would permit him to profit by such act in declaring a dissolution as of the date of the act and thereby forfeiting all of plaintiff's interest in future profits and in partnership assets.

Plaintiff filed his action for dissolution and an accounting in September 1954. On February 18, 1955, the lower court issued an interlocutory order which purported to dissolve the partnership as of that date. (Transcript of Record, Vol. I, p. 94.) However, in the final judgment the court fixed July 1, 1953, as the date of dissolution and purported to fix the plaintiff's interest in the partnership as of that date. (Transcript of Record, Vol. I, p. 113.)

Plaintiff contends that under the Guam laws pertaining to partnerships a partnership for a fixed term is not dissolved by the express will of one partner alone. Guam Civil Code Section 2425 provides as follows:

> "Section 2425. Causes of Dissolution. Dissolution is caused:
>
> (1) Without violation of the agreement between the partners:
>
> (a) By the termination of the definite term or particular undertaking specified on the agreement;

(b) By the express will of any partner when no definite term or particular undertaking is specified;

(c) By the express will of all the partners who have not assigned their interests or suffered them to be charged for their separate debts, either before or after the termination of any specified term or particular undertaking;

(d) By the expulsion of any partner from the business bona fide in accordance with such a power conferred by the agreement between the partners.

(2) In contravention of the agreement between the partners, where the circumstances do not permit a dissolution under any other provision of this section by the express will of any partner at any time;

(3) By any event which makes it unlawful for the business of the partnership to be carried on or for the members to carry it on in partnership;

(4) By the death of any partner;

(5) By the bankruptcy of any partner or the partnership;

(6) By decree of the court under Section 2426."

Certainly, in this case, since the partnership was created for a term of fifty (50) years (Articles of Copartnership, Transcript of Record, Vol. I, p. 9), it could only be dissolved by decree of court under Section 2425(6) above.

In *Zeibak v. Nasser* (1938) 12 Cal. (2d) 1, at page 16, (82 P. (2d) 375), the court discussed the same problem. There, the plaintiff had conducted himself in a manner that gave rise to grounds for dissolution of the partnership or joint venture. The date of such conduct was found to have occurred as of December 11, 1932, by the trial court's findings. The trial court in that case, however, by minute order declared the partnership dissolved as of the date of the order, to wit: July 20, 1934. The defendants there appealed on the ground that the partnership was dissolved *ipso facto* on the earlier date.

The California Supreme Court upheld the trial court's determination that the date of dissolution when effected by judicial decree is not the date when facts forming the basis for such dissolution occur but, rather, when there is a judicial determination that such facts exist. In so holding, the Supreme Court in the *Zeibak* case, supra, cited the following cases that hold that for purposes of determination of a partner's interest and for dissolution of a partnership by equity, the date of dissolution is the date of judicial determination and order thereto: *Beller v. Murphy* (1910) 139 Mo. App. 663, 123 S.W. 1029; *Carrey v. Haun,* 111 Ore. 586, 227 P. 315; *Hartman v. Woeher,* 18 N.J. Eq. 383; *Smith v. Smith,* 183 S.W. 1126 (Mo. App.); (see 68 C.J.S. 849).

The *Zeibak* case, supra, also held that the partnership or joint venture in that case was not dissolved *ipso facto* on the additional grounds asserted by defendants that the plaintiff there was treated and con-

sidered as no longer a partner or person with any interest in the venture. (12 Cal. (2d) 1, at page 16.)

The language of the opinion makes it clear that mere treatment or belief of status is not a factor in determining the date of dissolution. Rather, the court's analysis of equity's dissolution of a partnership parallels the basic legal theory of a dissolution or divorce of marital status. Although a cause of action exists for divorce, the marriage is not legally severed until the facts establishing the cause of action are judicially determined and, when so determined, the date of severance of the marriage bond is the date of the judicial decree and not the date of the happenings upon which the decree is based. (*Corbett v. Corbett* (1931) 113 C.A. 595, 298 P. 819.)

It will be noted that in the *Zeibak* case (12 Cal. (2d) 1, 82 P. (2d) 375) the plaintiff was the wrongdoer between the partners. Plaintiff contends in this action that he was not the wrongdoer and, therefore, is entitled to more protection in a court of equity than the plaintiff received in the *Zeibak* case, supra.

IV. THE LOWER COURT ERRED IN FAILING TO ORDER A COMPLETE ACCOUNTING OF THE AFFAIRS OF THE PARTNERSHIP DURING THE PERIOD THEY WERE DIRECTED BY THE DEFENDANT.

Although the accounts of the plaintiff during the time of his management are admitted as accurate, no accounting was required of the defendant for his management of partnership affairs. Thus, the court

and the plaintiff are without knowledge as to the status of the partnership business, its assets or liabilities and the extent to which its assets are dissipated.

The trial court in its supplemental findings of fact and conclusions of law (Transcript of Record, Vol. I, p. 110) found that the defendant had accepted as correct the monthly financial statements prepared by plaintiff's bookkeeper from the date the business commenced until May 31, 1953. The June 1953 statement was never submitted by defendant who was then in control of the business. (Transcript of Record, Vol. I, p. 110.) The lower court did not order any accounting of the business subsequent to the date of plaintiff's exclusion from the partnership, to wit: July 1, 1953.

In this, the plaintiff contends, the trial court erred. An accounting means there is to be a complete winding up of the affairs of the partnership. (*Albery v. Geis* (1905) 1 C. A. 381, 82 P. 262.) The accounting should include all assets and profits up to the date of dissolution, to wit: February 18, 1955, and not just until the date of plaintiff's exclusion.

In *Alechoff v. Edwards* (1921) 55 C.A. 277, 279 (203 P. 415), the court held that in an action for dissolution of a partnership and for an accounting based upon the wrongful act of the defendant in taking exclusive possession of the business and the property, an accounting up to the date of the filing of the interlocutory decree was proper. This is so, the court held, regardless of whether the dissolution occurred when defendant took exclusive possession or when the de-

cree was entered, since the defendant, having assumed the responsibility of liquidation of the affairs of the partnership, should not be permitted to escape a complete accounting.

The present case is completely analogous. The defendant, under the terms of the partnership agreement, could have dissolved the partnership by giving the requisite notice as provided therein. Alternatively, if it felt it had sufficient reason, it could have applied to a court of equity for dissolution of the partnership.

Defendant chose neither course. By a legal fiction it attempted to disclaim the partnership agreement and thereby keep unto itself all profits and appreciation of the assets of the partnership. It next altered the books of the partnership to reflect corporate ownership from the beginning of the business. It even invested partnership funds in another competing corporation and received stock therein in its own name. It refused and failed to recognize any rights of plaintiff after July 1, 1953, except, possibly, as to his original contribution of Fifteen Thousand Dollars ($15,000.00).

To terminate the accounting at the date of exclusion (July 1, 1953) permits the defendant to use plaintiff's interest in the partnership to produce profits for its own sole use and benefit.

A partner is a fiduciary and is accountable to the partnership for any benefit obtained from any transaction connected with the formation, conduct or liquidation of the partnership or any use by him of its property. (Guam Civil Code, section 2415 (1).) As

such, he is trustee for the benefit of the partnership. (*Air Purification, Inc. v. Carle* (1950) 99 C.A. (2d) 258, 221 P. (2d) 700.)

Plaintiff thereby contends the trial court erred by not awarding plaintiff his pro-rata share in any and all assets, in addition to all profits that belong to the partnership, including the interest in Guam Frozen Products, Inc., taken in the name of defendant. Such interest, paid out of partnership funds, is partnership property (*Roberts v. Eldred* (1887) 73 Cal. 394, 397, 15 P. 16; *Rishwain v. Smith* (1947) 77 C.A. (2d) 524, 534, 175 P. (2d) 555) and is held in trust for the benefit of the partnership (*Swarthout v. Gentry* (1934) 62 C.A. (2d) 68, 78, 144 P. (2d) 38; *Rishwain v. Smith,* supra, at page 534).

Only a complete accounting up to the date of judicial dissolution, to wit: February 18, 1955, can determine the value and extent of plaintiff's partnership interest.

V. THE LOWER COURT ERRED IN FAILING TO REQUIRE A WINDING-UP OF THE PARTNERSHIP BUSINESS UNDER THE CONTROL OF A RECEIVER AND THE SALE AND/OR DISTRIBUTION OF ITS ASSETS TO THE PARTIES.

The lower court not only allowed the defendant all of the profits of the business from July 1, 1953, but also has left the partnership business in the hands of the defendant without winding up the affairs of the partnership by sale and distribution. In fact, the judgment of the court would require the plaintiff to assign his share of the partnership business to the defendant.

Section 2424 of the Guam Civil Code provides as follows:

> "Section 2424. Partnership Not Terminated By Dissolution. On dissolution the partnership is not terminated, but continues until the winding up of partnership affairs is completed."

Plaintiff contends that the lower court, after ordering the dissolution, failed to wind up the affairs of the partnership by not ordering a sale or distribution of its assets to the parties in accordance with their partnership interest. The court erred also in failing to consider the request of plaintiff that a receiver be appointed to cause said winding-up and termination of the partnership. (Amended Complaint, Transcript of Record, Vol. I, p. 28.)

Rather, the plaintiff was awarded only his pro-rata share of profits to the date of his exclusion, to wit: July 1, 1953, together with the return of his original investment, plus interest. Also, the lower court's judgment provided that defendant was entitled, after payment of the above judgment, to have transferred to it all of plaintiff's interest in the partnership assets. (Transcript of Record, Vol. I, p. 113.)

As a general rule the court, after an accounting, should require the partnership property to be sold. The net proceeds of such sale are then divided among the partners. An exception to the rule is the situation where it is fair and convenient to order a division of the assets in kind. (*Shuken v. Cohen* (1918) 179 Cal. 279, 176 P. 447; *Swarthout v. Gentry* (1943) 62 C. A. (2d) 68, 144 P. (2d) 38.)

The lower court's decision in this case followed neither alternative. Plaintiff contends he is entitled to a complete accounting of all the affairs of the partnership and is also entitled to the appointment of a receiver to prevent the dissipation of the assets. (*Breedlove v. Breedlove Excavating Co.* (1942) 56 C.A. (2d) 141, 132 P. (2d) 239.) Plaintiff also contends that all the assets should be marshalled and either sold and the net proceeds distributed or there be ordered a distribution in kind. (*Swarthout v. Gentry,* supra.)

VI. THE LOWER COURT ERRED IN AWARDING PLAINTIFF ONLY THE RETURN OF HIS ORIGINAL INVESTMENT, PLUS INTEREST, PLUS A SHARE OF THE PROFITS TO JULY 1, 1953, AND BY FAILING TO ALLOW PLAINTIFF A SHARE OF THE PROFITS SUBSEQUENT TO JULY 1, 1953, AND A SHARE OF THE TANGIBLE ASSETS OF THE PARTNERSHIP BUSINESS.

The effect of the judgment of the court is to forfeit all of the plaintiff's interest in the partnership assets by returning to him his original investment only. Thus, in addition to being excluded from profits from July 1, 1953, any appreciation in the capital value of the assets would accrue only to the benefit of the defendant. This is an improper application of the partnership laws, even though the dissolution were caused by act of the plaintiff, whereas in this case dissolution was in fact caused by act of the defendant.

A. *Partner entitled to his share of all assets.* Plaintiff invested Fifteen Thousand Dollars ($15,000.00) cash and other value into the partnership in return for a fifty per cent (50%) interest. By the

lower court's final decision (Transcript of Record, Vol. I, pp. 110-113) the defendant was able to successfully dissolve the partnership, then a profitable and successful business, by excluding plaintiff. The lower court only awarded plaintiff his original cash investment, plus interest, and thereby excluded him from any participation in his property interest in the business.

Plaintiff contends that the trial court erred in this award for it failed to recognize the rule that a partner's interest in a partnership is not a fixed monetary sum determined by the original contribution. Rather, it is a contribution which creates a proportionate interest in the venture which can appreciate or depreciate in value, depending upon the economic factors which affect the partnership as a business venture. Section 2402, Guam Civil Code, provides as follows:

> "Section 2402. Partnership Property. (1) All property originally brought into the partnership stock or subsequently acquired, by purchase or otherwise, on account of the partnership is partnership property.
>
> (2) Unless the contrary intention appears, property acquired with partnership funds is partnership property.
>
> (3) Any estate in real property may be acquired in the partnership name. Title so acquired can be conveyed only in the partnership name.
>
> (4) A conveyance to a partnership in the partnership name, though without words of inheritance, passes the entire estate of the grantor unless a contrary intent appears."

(See also Guam Civil Code Section 2412(a), 2420 and 2434(a).)

A simple factual situation is illustrative of the above principle. A and B enter into a partnership. Their sole contributions consist of one-half each of the purchase price of a piece of land which they intend to hold as a speculative investment. After a period of time the value of the land increases from Ten Thousand Dollars ($10,000.00), the purchase price, to Twenty-five Thousand Dollars ($25,000.00). Even though A may be guilty of conduct which gives rise to a right in behalf of B to apply for dissolution, A does not lose the right to his one-half interest in the land at its present increased evaluation. (*Zeibak v. Nasser* (1938), 12 Cal. (2d) 1, 82 P. (2d) 375; *Gardner v. Shreve* (1949), 89 C.A. (2d) 804, 808, 202 P. (2d) 322, citing California Civil Code, Section 2432 (2) (now California Corporations Code, Section 15038 (2), which is the same as Guam Civil Code, Section 2432 (2).)

In the *Zeibak* case, supra, the plaintiff was held to have wrongfully caused the dissolution of the joint venture. However, it was recognized by the court that plaintiff was nonetheless entitled to the value of his partnership interest and not just a return of his original investment.

In the present case no attempt was made to evaluate the plaintiff's interest. On the contrary, the court merely awarded him his original investment, plus interest from July 1, 1953, date.

In view of the language of the Uniform Partnership Act, plaintiff contends the trial court should have ordered the property appraised as of the date of dissolution. If defendant is entitled to continue possession of the assets under Guam Civil Code Section 2432 (2), then plaintiff is entitled to the value of his share.

Under the Uniform Partnership Act even the partner wrongfully causing dissolution is only subject to loss of the good will and damages, if any. (Guam Civil Code 2432 (2).) He does not forfeit his interest in the partnership. (*Gardner v. Shreve* (1949), 89 C.A. (2d) 804, 202 P. (2d) 322.)

B. *Partner entitled to pro-rata share of profits.* Plaintiff contends the lower court erred in that it failed to award him his *pro-rata* share of all profits earned up to February 18, 1955. Plaintiff was awarded his share of assets up to July 1, 1953, the date of his exclusion from the partnership. (Transcript of Record, Vol. I, p. 112.) The reasoning for the court's failure to award profit past that date was apparently predicated upon its determination that July 1, 1953, was the proper date of dissolution.

However, plaintiff contends that, as hereinbefore argued, the partnership was properly dissolved as of February 18, 1955, by the court's interlocutory order (Transcript of Record, Vol. I, p. 94), and plaintiff's interest in earned profits should be determined as of that date, rather than the date of his exclusion, to wit: July 1, 1953.

Zeibak v. Nasser (1938), 12 Cal. (2d) 1, 82 P. (2d) 375, is authority for the proposition that a partnership not dissolved by its partners by terms of the agreement or a partnership for a fixed term (contrasted to one at will) must be dissolved by judicial decree. And being so dissolved, the proper date is the date of the decree and not any prior date of happenings that may have given rise to the cause of action for dissolution. (*Zeibak* case, supra, 12 Cal. (2d) 1, at page 16.)

In *Hartman v. Woeher,* 18 N.J.Eq. 383, cited in the *Zeibak* case, supra, 12 Cal. (2d) 1, at page 16, the court said as follows:

> "If part of the capital of an agreed partnership has been paid, accepted, and used, and the business has been commenced in the name of the firm, he is an actual partner until the partnership is legally dissolved, and a mere exclusion of such person by the others from the business of the firm by illegal acts on their part is not a legal dissolution, but is a ground for an application to a court of equity for a dissolution upon his part, and, until such dissolution is had, he is entitled on an accounting, to his share of the profits."

The *Zeibak* case followed this principle of partnership law, and its reasoning is particularly applicable to this case. To exclude the plaintiff from the profits earned by the Dairy Queen from its inception would permit the defendant to wrongfully use the partnership assets to its own sole use and benefit to the detriment of plaintiff.

Even if it be assumed for the purpose of discussion that in this case the date of dissolution was properly fixed by the lower court at July 1, 1953, plaintiff contends that he is still entitled to profits earned subsequent to July 1, 1953.

The general rule is that a partner cannot continue to use partnership property for his own sole use and benefit without being accountable therefor to the partner who, for one reason or another, has not received his distributive share and is not in possession of the partnership property. The operation of this rule permits the excluded partner to a full accounting and his election thereafter to his pro-rata share of profits or interest.

Plaintiff's authority for the above is initially Guam Civil Code Sections 2415 (1) and 2436 (same as California Corporations Code Sections 15021 (1) and 15042) which provide as follows:

> "Section 2415. Partner Accountable as a Fiduciary. (1) Every partner must account to the partnership for any benefit and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use by him of its property.
>
> (2) * * * "
>
> "Section 2436. Rights of Retiring or Estate of Deceased Partner When the Business is Continued. When any partner retires or dies, and the business is continued under any of the conditions set forth in Section 2435 (1), (2), (3), (5),

(6), or Section 2432 (2) (b) without any settlement of accounts as between him or his estate and the person or partnership continuing the business, unless otherwise agreed, he or his legal representative as against such persons or partnerships may have the value of his interest at the date of dissolution ascertained, and shall receive as an ordinary creditor an amount equal to the value of his interest in the dissolved partnership with interest, or, at his option, or at the option of his legal representative, in lieu of interest, the profits attributable to the use of his right in the property of the dissolved partnership: Provided, That the creditors of the dissolved partnership as against the separate creditors, or the representative of the retired or deceased partner, shall have priority on any claim arising under this section, as provided by Section 2435 (8) of this code."

For a general and exhaustive review of the right to profits after dissolution of a partnership, see 80 ALR 12, et seq., and 2 ALR (2d) 1084. The following cases support this view in California before and after passage of the Uniform Partnership Act (Stats 1929, Ch 864, p. 1897): *Mosley v. Mosley* (1952 9th Circ.), 196 Fed. (2d) 663; *Nuland v. Pruyn* (1950), 99 C.A. (2d) 603, 613, 222 P. (2d) 261; *Hall v. Watson* (1946), 73 C.A. (2d) 735, 167 P. (2d) 210; *Puppee v. Utter* (1925), 76 C.A. 19, 243 P. 715; *Painter v. Painter,* 4 Cal. Unrep. 636, 36 P. 865.

VII. THE LOWER COURT ERRED IN FAILING TO APPRAISE THE VALUE OF THE GOOD WILL OF THE PARTNERSHIP BUSINESS AND TO AWARD THE SAME TO THE PLAINTIFF AS INNOCENT PARTY TO THE DISSOLUTION.

Under the partnership law of Guam the innocent party is entitled to the value of the good will of the business upon the sale and distribution of the assets. The basis of such rule undoubtedly is that the innocent party has contributed to the good will, whereas the guilty party has injured the good will of the partnership business by his conduct. In the case at bar plaintiff's employees managed the business and created a large measure of the value of the business by operating the same at a profit and otherwise building up good will with the public. The acts of the defendant have tended to destroy the good will of the business so that, in addition to causing the dissolution of the partnership, the defendant's act in contravention of the agreement have in fact harmed the partnership, and whatever value of good will remains should be awarded to the plaintiff.

The lower court by its decision and judgment awarded defendant, in addition to the tangible assets, the good will of the partnership business. This asset was not appraised and plaintiff was accorded no interest therein.

The lower court held that "* * * 2. The partnership of the parties was dissolved by exclusion of the plaintiff because of his breach and acquiescence in such exclusion as of July 1, 1953." (Transcript of Record, Vol. I, p. 113.) Plaintiff has argued herein that there is no evidence to show any acquiescence to

his exclusion from the partnership, that he did not breach the agreement, and dissolution should have been based upon defendant's wrongful exclusion of plaintiff from the partnership. (*Zeibak v. Nasser* (1938), 12 Cal. (2d) 1, 82 P. (2d) 375; *Gorman v. Russell* (1860), 14 Cal. 431; *Thomson v. Langton* (1921), 51 C.A. 142, 196 P. 103; *Mills v. Williams* (1925), 113 Ore. 528, 233 P. 542; *Beller v. Murphy* (1910), 139 Mo. App. 663, 123 S.W. 1029.)

Plaintiff contends also that the lower court erred in failing to find and hold that defendant wrongfully caused the dissolution by diversion of partnership funds into a competing business. (*Llewelyn v. Levi* (1909), 157 Cal. 31, 37, 106 P. 219; *Dennis v. Gordon* (1912), 163 C. 427, 125 P. 1063; *Donleavy v. Johnston* (1914), 24 C.A. 319, 141 P. 229.)

The evidence to show this diversion of partnership funds is clear and uncontroverted. (Transcript of Record, Vol. I, p. 112; Vol. II, p. 265.)

As innocent party to the dissolution, plaintiff respectfully contends that he is entitled to the entire appraised valuation of the good will. Guam Civil Code, Section 2432 (2) (c) provides as follows:

> "Section 2432. Rights of Partners to Application of Partnership Property. * * *
>
> (2) (c) A partner who has caused the dissolution wrongfully shall have: * * *
>
> II. If the business is continued under paragraph (2) (b) of this section the right as against his copartners and all claiming through them in respect of their interest in the partnership to have

the value of the interest in the partnership less any damages caused to his copartners by the dissolution, ascertained and paid to him in cash, or the payment secured by bond approved by the court, and to be released from all existing liabilities of the partnership; *but in ascertaining the value of the partner's interest the value of the good will of the business shall not be considered.*" (Emphasis added.)

Zeibak v. Nasser (1938), 12 Cal. (2d) 1, at page 8, 82 P. (2d) 375, and *Gardner v. Shreve* (1949), 89 C.A. (2d) 804, 202 P. (2d) 322, have both interpreted this provision which seems clear in its effect.

Any other result would permit the defendant to possess and benefit solely from the good will that plaintiff and his agents and employees established in the year prior to the plaintiff's exclusion from the partnership by defendant.

Dated, January 18, 1956.

Respectfully submitted,
JOHN A. BOHN,
WALTER S. FERENZ,
Attorneys for Cross-Appellant and Appellee.

United States Court of Appeals
For the Ninth Circuit

No. 14805

AMERICAN PACIFIC DAIRY PRODUCTS, INC.,
a corporation, *Appellant,*
vs.
JOSEPH A. SICILIANO, *Appellee.*

JOSEPH A. SICILIANO, *Appellant,*
vs.
AMERICAN PACIFIC DAIRY PRODUCTS, INC.,
a corporation, *Appellee.*

UPON APPEAL FROM THE DISTRICT COURT OF GUAM

BRIEF OF CROSS-APPELLEE AMERICAN PACIFIC DAIRY PRODUCTS, INC. IN RESPONSE TO OPENING BRIEF OF JOSEPH A. SICILIANO, CROSS-APPELLANT

LITTLE, LESOURD, PALMER, SCOTT & SLEMMONS,
BROCKMAN ADAMS,
Attorneys for Appellant and Cross-Appellee.
American Pacific Dairy Products, Inc.
1510 Hoge Building,
Seattle 4, Washington.

THE ARGUS PRESS, SEATTLE

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BROCKMAN ADAMS,
Attorneys for Appellant and Cross-Appellee.
American Pacific Dairy Products, Inc.
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COMMENT ON STATEMENT OF FACTS

The original defendant and cross-appellee, American Pacific Dairy Products, Inc., in Cause No. 14805, has already filed an opening brief as appellant and will not repeat a Statement of the Case in this appellee brief. Reference is hereby made to the Statement of the Case in defendant-appellant's opening brief, starting at page 4.

The function of this comment is to point out that defendant American Pacific Dairy Products, Inc., has been unable to establish from the Record certain of the facts set forth in the Statement of the Case contained in

the opening brief of plaintiff and cross-appellant Joseph A. Siciliano.

First, it is stated that the cross-appellant Siciliano (hereinafter referred to as the plaintiff) transferred trained personnel from his own corporation to the partnership business for use on partnership business at no expense to the partnership. It is then stated that plaintiff left the operation of the ice cream store in charge of his corporate management and that plaintiff "directed his affairs in the territory through the management personnel of his corporation by correspondence and telephone calls with his personnel" (Pl. Br. 4 and 5). The plaintiff Siciliano then concludes that plaintiff thus provided, at his own expense, trained supervision of the partnership business during all times that the same was under his control (Pl. Br. 5). The record discloses that plaintiff Siciliano billed the partnership on behalf of his corporation, Pacific Enterprises, Inc., for the salaries of all personnel, including any management people (R. 14806, Page 8 at XIII). This item was not allowed by the trial court, not because it wasn't demanded, but because there was no evidence to support it (R. 14806, Pages 70-71 and 231). The management personnel referred to in the Record are Mr. Ernesto O. Diza and Joseph Meggo. It is undisputed that Mr. Edward Thompson demanded and received reports from Mr. Diza (R. 14805, Pages 280-281), and that Mr. Thompson would send invoices for supplies, checks for payments of expenses, and letters on operation to this employee (R. 14805, Pages 171, 295, 297, 298). It is also undisputed from the testimony

of the individuals themselves that Diza did not make any reports to Siciliano or receive any instructions from him (R. 14805, Pages 294). The employee Meggo, in charge of the other employees, did not ever make a written report to the appellee or receive any written instructions from him, and during the two-year absence of the plaintiff, Siciliano only talked to him on the telephone twice (R. 14805, Page 179).

Cross-appellant Siciliano states that the amounts mentioned in the reports of Diza were accepted as correct by the president of defendant American Pacific Dairy Products, Inc. (Pl. Br., Page 5). The Record establishes that Mr. Thompson, the president of the appellant, received these reports but he could not testify as to their accuracy (R. 14805, page 222).

Cross-appellant Siciliano states that there was no explanation as to why the corporate books were changed to reflect the periods September 1, 1952 to July 1, 1953, instead of to reflect cumulative sales and profits from the beginning of operation of the business (Pl .Br. page 7). The Record reflects that the reason for this change was to place the books of the Dairy Queen on the fiscal year basis of defendant American Pacific Dairy Products, Inc., which was September 1, to August 31 (R. 14805, page 224-232).

Cross-appellant Siciliano states that profits and funds of the partnership business were used by the defendant for the benefit of a competing corporation known as Guam Frozen Products, Inc. (Pl. Br., page 7-8). It is true that funds of American Pacific Dairy Products, Inc., were used in establishing Guam Frozen

Products, Inc., but this was done after the dissolution and termination of the purported partnership and the Record does not reflect that any of the funds of Siciliano were used for this purpose (R. 14805, page 239-242).

For a statement of the defendant cross-appellee's, position regarding all the facts of this case reference is again made to the Statement of the Case of defendant, American Pacific Dairy Products, Inc., contained in the brief of appellant, American Pacific Dairy Products, Inc., starting at pages 4 and 5.

ARGUMENT AND AUTHORITIES

I.

The Lower Court Properly Held That the Partnership Agreement Required the Plaintiff to be Physically Present on Guam and That the Plaintiff Was Not An Innocent Party But Rather Caused the Dissolution of the Partnership, and These Findings of Fact of the Lower Court Should Not Be Set Aside.

The Findings of Fact of the Lower Court should not be set aside unless clearly erroneous. Federal Rules of Procedure, 52(a). For many cases establishing this proposition reference is made to the annotation in F.R.C.P. 52(a) Title 28 U.S.C.A. See particularly notes 38 and 43.

In Case No. 14805, the appellant cross-appellee American Pacific Dairy Products, Inc., the defendant in the court below, (hereinafter referred to as the defendant), does not challenge the Findings of Fact of the Lower Court except as to the court's finding that there

was a formal partnership, if, in fact, the Lower Court actually found there was a formal partnership. The defendant is of the opinion that the Lower Court did not ever make such a finding. See (Brief of appellant, American Pacific Dairy Products, Inc., pages 29-31) and the court's findings (R. 14805, pages 103 and 114).

The cross-appellant and appellee, Joseph A. Siciliano, the plaintiff the court below (hereinafter referred to as the plaintiff) in his opening brief starting at page 9, lists the specifications of error on which he relies. An examination of the seven specifications of error set forth and the arguments which attempt to establish these specifications indicates Specifications I, II and VII require that the Findings of Fact of the lower court be found to be erroneous as not being supported by the evidence.

In Specification of Error No. I and the argument thereunder, plaintiff argues that Sections 7, 8 and 13 of the purported partnership agreement (R. 14805, pages 9-13) did not create a contractual duty on the part of the plaintiff to assume managership of the ice cream business (Pl. Br. page 12). The trial court found that as a matter of fact that when these agreements were entered into the defendant needed the plaintiff to manage its store and in turn plaintiff was given the opportunity to invest in what proved to be a very profitable business (Record 14805, pages 98-99). Again it was further stated by the lower court:

> "The plaintiff contends that the partnership agreement did not require him to act as manager but merely provided for his compensation while employed as manager. While it is true that the

> agreement could be more explicit, no provision is made in the agreement for any other manager or for selecting any other manager. The plaintiff was in Guam; Thompson was to be in Seattle, Washington. The entire agreement contemplated that the defendant relied upon the plaintiff to provide his services and initiative in carrying on the business. This is further evidenced in Paragraph 13(a) of the agreement, which provides that the salary of the plaintiff shall cease at the time of his death. It is inconceivable that if plaintiff was not obligated to manage the business that no provision would have been made for the appointment of another manager." (Record 14805, pages 102-103)

This finding of the lower court is amply supported by the evidence. For example, Mr. Edward Thompson, president of defendant, testified under questioning of the plaintiff's attorneys that he believed Mr. Siciliano was "one of the ablest men I know" (Record 14805, page 252). Mr. Siciliano, the plaintiff, testified that he was to be manager (Record 14805, page 148). Mr. Edward Thompson, president of American Pacific Dairy Products, Inc., testified that when he arrived in Guam he discovered that Mr. Slaughter, the corporate manager on Guam, was leaving for Ethiopia and that at this time he knew it was absolutely necessary to the business to have another manager (Record 14805, pages 318-320). The defendant, American Pacific Dairy Products, Inc., submits that the finding of the court that the plaintiff Siciliano was to manage the business is amply supported by the evidence.

In Specification of Error No. II, plaintiff Siciliano states: "The lower court erred in failing to hold that

the defendant breached the partnership agreement as of July 1, 1953, when it excluded plaintiff from participation in the partnership business and took unto itself all of the partnership profits and assets."

It is a mixed question of fact and conclusion of law whether defendant or plaintiff breached the partnership agreement. It is undisputed from the record that plaintiff Siciliano left the island of Guam nine days after the agreements were signed and remained away from the island of Guam for a period in excess of two years (Record 14805, pages 99-101, 148-149, 328). The defendent American Pacific Dairy Products, Inc., submits that the admitted fact of plaintiff Siciliano's leaving the island of Guam after promising to act as manager of the proposed business amply supports as a matter of fact the lower court's conclusion that the plaintiff breached the agreement and not the defendant.

No. VII of the plaintiff's Specifications of Error states that the lower court erred in failing to give the plaintiff the value of the good will of the partnership business and argues this on the basis that the plaintiff was an innocent party to the dissolution. The innocence of the plaintiff again is a question of fact which the trial court decided against the plaintiff when the court decided that plaintiff breached the agreement by his failure to remain on Guam (Record 14805, pages 102-103). The cross-appellee American Pacific Dairy Products, Inc., submits that this finding of the court is amply supported by the record and should not be set aside (R. 14805, pages 148-149, 328). Therefore, since plaintiff Siciliano is not an innocent party to the dissolution,

he is not entitled to the value of the good will of the partnership business upon dissolution. Guam Civil Code, Section 2432.

II.

The Plaintiff Siciliano Breached the Conditions of His Offer Which Was Never Accepted by the Appellant American Pacific Dairy Products, Inc.

The defendant American Pacific Dairy Products, Inc., as pointed out in its opening appellant brief, maintains there was no partnership between the parties, since the proposed agreement was never ratified by the appellant corporation. The appellant corporation has been willing to recognize any liability which might be imposed upon it due to the reliance of plaintiff Siciliano upon the actions of its president or the actions of the corporation in not immediately appointing a new manager for its business upon Guam and, therefore, concedes there may have been a defacto partnership during some of the 10 months prior to defendant establishing its new manager. The difficulties involved in this law suit would never have arisen if plaintiff Siciliano had remained upon Guam and carried out his promises. The refusal of the Board of Directors of defendant to ratify the proposed agreement was based upon the fact that Mr. Siciliano's status on Guam had changed from the time of the proposed agreement, and, therefore, the corporation would not be obtaining what its president, Edward Thompson, had bargained for in attempting to establish a partnership with the plaintiff Siciliano. The lower court, after hearing all the witnesses and exam-

ining all of the exhibits sums up the situation as follows:

> "As of the time these agreements were entered into the situation was perfectly clear. The defendant needed the plaintiff to manage its store in which it had invested nearly all of its corporate capital. In turn, the defendant was given the opportunity to invest in what proved to be a very profitable business. For his $15,000 and an additional $4,000 to be paid out of profits he received a 50 per cent interest in a now (sic new) and challenging business enterprise along the lines of his business experience and aptitude." (R. 14805, 98-99)

and

> "The plaintiff, having breached his agreement, forced the defendant to protect itself by taking over the partnership assets. Prior to this step the defendant made every reasonable effort to induce the plaintiff to comply and to leave the door open for his return." (R. 14805, page 108)

If this court accepts appellant American Pacific Dairy Products, Inc.'s, argument that there was no contract of partnership but rather an informal agreement which can be construed to be a *de facto* partnership starting June 23, 1952, to prevent injustice, then there is no doubt that the plaintiff breached the terms of this *de facto* agreement by leaving Guam on July 1, 1952. It follows that defendant American Pacific Dairy Products, Inc., was justified in refusing to go forward with plaintiff Siciliano in the business venture, and was justified on April 23, 1953, completely terminating the arrangement by tendering to plaintiff Siciliano the $15,000 he had contributed to the business and having its own manager

take over operation of the business (Defendant's Exh. F, R. 344; R. 59-67, Exh. E attached to the answer) (R. 14805, pages 269-270, 385). The plaintiff Siciliano himself, in his brief, page 12, indicates that no agreement was reached on the point of the amount of time plaintiff was to spend in managing the partnership business, and, therefore, seems to also be arguing there was no agreement between the parties.

The plaintiff Siciliano argues that this is not the type of business which requires a manager or that customarily precludes delegation of performance to agents and employees. Plaintiff cites Restatement, Law of Contracts, Section 160(3) and Section 160(2). Both of these sections clearly set forth that performance or offer of performance by a person delegated is not acceptable if:

> "Performance by the person delegated varies or would vary materially from performance by the person named in the contract as the one to perform, and there has been no such assent to the delegation as stated in Section 162 * * * " (Restatement, Law of Contracts Sec. 160)

The Record amply supports the necessity for the defendant (which is a Washington corporation with its officers and directors in Seattle), having a responsible manager on Guam to take care of its business. The Lower Court found as a matter of fact that the employees of Pacific Enterprises, Inc. were not properly operating the business and that delegation to them was certainly not proper. For a listing of the improper conditions which existed at the store prior to the arrival of defendant's full time manager in April, 1953, see

the Court's summary in its opinion (R. 14805, pages 101-102).

The plaintiff Siciliano argues that the functions, duties, rights and liabilities of partners in a great measure comprehend those of agents. An examination of the cases cited by the plaintiff indicates that these cases refer to the relationship of the partners toward third parties and the liability of one partner toward a third party caused by the action of another partner. These cases certainly do not stand for the proposition that one partner may delegate the management of the business to a series of sub-employees without even providing a general agent to manage such employees. The plaintiff cites as authority for the proposition that a manager or partner has the power to appoint third persons as agents or employees to conduct partnership business the case of *State Compensation Insurance Fund v. Industrial Insurance Commission* (1933) 28 Cal.App.2d 474, 82 P.2d 732.

This case does not hold that the manager of a business may delegate all managerial responsibility to the employees of the business. In this case it was a matter of determining whether a partner had hired a chauffeur and was on partnership business at the time when an accident occurred injuring the chauffeur. The defendant American Pacific Dairy Products, Inc. has paid the salaries of the employees hired by Joseph Siciliano while he was acting as a purported agent of American Pacific Dairy Products, Inc., and, therefore, the question of whether the employees can collect from the defendant or its insurers is not at issue.

III.

Even If There Was a Partnership Agreement the Defendant Did Not Cause a Breach by Its Action of Excluding the Defendant in April, 1953, or Investing in Another Store in November, 1953.

The plaintiff Siciliano, in his argument that defendant breached the agreement (Pl. Br. section II P. 19-23) confuses the Lower Court's findings as to point of time when defendant finally wound up the business with the time of the breach of the agreement caused by Plaintiff Siciliano leaving the Island of Guam. The Lower Court found that the plaintiff reached San Francisco in July, 1952, and that he was gone from Guam for a period of two years and that Thompson (president of appellant) made every reasonable effort to induce the plaintiff to return, and that no action was taken to "liquidate the partnership until many months after the situation was known to exist" (R. 14805, page 100). The Court found that the defendant abandoned its efforts to get the plaintiff to return and took exclusive control of the partnership business on July 1, 1953 (R. 14805, p. 102). At this point liquidation has occurred. The evidence is undisputed that the defendant American Pacific Dairy Products, Inc. did not invest in Guam Frozen Products, Inc. until November, 1953, which was *five months after the liquidation* of the partnership business (R. 14805, p. 239). These findings establish that there was no partnership to be dissolved in November, 1953 when defendant invested in Guam Frozen Products.

It would seem to be elementary under the partner-

ship statutes that a partner cannot substitute another for himself in the business without causing a dissolution of the partnership. Guam Civil Code Section 2423.

The defendant American Pacific Dairy Products, Inc. certainly did not acquiesce or accept this delegation of authority as is shown by the resolutions sent to Mr. Siciliano (R. 14805, Ex. E attached to Answer page 59-67), and findings of the trial court (R. 14805, pages 100-101 and 108). As is pointed out in the appellant's opening brief, the Board of Directors of the appellant offered Mr. Siciliano every chance to return to the Island of Guam, and at no time acquiesced in any delegation of authority to the employees of Mr. Siciliano (R. 14805, page 108) (Appellant American Pacific Dairy Products, Inc. Brief, pages 33-34).

Even if these was not an automatic dissolution on July 1, 1952, when plaintiff left the Island of Guam, defendant certainly had the right to terminate the management by notice on April 21, 1953. In this connection reference is made to the case of *Zeibak v. Nasser,* 12 Cal.2d 1, 82 P.2d 375. The *Zeibak* case is cited by the plaintiff in seven separate places and was quoted by the Lower Court in its memorandum opinion. In the *Zeibak* case the plaintiff Zeibak sued for a dissolution of an informal joint venture with the Nasser brothers who were operating a series of theaters in California. The Nasser brothers (the defendants) were to manage certain theaters for Zeibak and the Nassens but the parties had a falling out because plaintiff Zeibak wanted to manage the theaters. Also Zeibak refused to enter into a corporation with the

Nasser brothers as had been agreed to at the start of the venture. The Nasser brothers tried to get the plaintiff Zeibak to perform and finally excluded him from the busines. The trial court found that the *plaintiff Zeibak wrongfully caused the dissolution by refusing to carry out his original agreement* and that the defendants Nasser were justified in finally excluding Zeibak from the joint venture. The Appellate Court upheld the finding and the judgment of the Lower Court and stated that the defendants were justified in excluding the plaintiff Zeibak from the business. The Appellate Court also found that the Nassers had a going business before they discussed a joint venture with the plaintiff Zeibak and that there was no formal partnership agreement because the defendants Nasser could not get the plaintiff Zeibak to comply with the original conditions.

This case is remarkably similar to the case at bar and the defendant American Pacific Dairy Products, Inc. is willing to submit the case to this court on the basis of the *Zeibak* case. As in the *Zeibak* case, the defendant American Pacific Dairy Products, Inc. had a going business before Siciliano came in, was unable to reach a final agreement with the plaintiff Siciliano regarding the business because he would not or could not carry out the terms of the original agreement and after much discussion was finally required to exclude him from the business. The *Zeibak* case completely supports the position taken by defendants in the case at bar and supports the trial court's decision that dissolution should have been decreed because of the plaintiff Sici-

liano's refusal to carry out the terms of the original proposals even though a formal agreement was never finally ratified.

The cross-appellee American Pacific Dairy Products, Inc., does not question the fact that a partner is accountable as a fiduciary during such period as a partnership exists. At such time, however, as the partnership has been dissolved and terminated by a tender to the plaintiff of his interest in the business, there was no longer a partnership, and unless it can be shown that the accounting partner has improperly used the funds of the retiring or abandoning partner, there is no evidence that any fiduciary duty or relationship has been breached. There is no evidence in the record that cross-appellee American Pacific Dairy Products, Inc. ever used any of the funds of plaintiff Siciliano or any purported profits arising therefrom to which plaintiff Siciliano was entitled.

The plaintiff cites the case of *Lanpher v. Warshauer* (1915) 28 Cal. App. 457, 152 Pac. 933, as authority for the proposition that plaintiff's actions in the case at bar cannot in fact or in law be construed as an intent to abandon or relinquish the business in favor of the defendant. The *Lanpher* case, *supra,* is not at all analogous to the case at bar since in that case the plaintiff agreed to build and construct buildings using defendant's capital and defendant's land with both parties to share in the profits of any future sale of the property. The plaintiff did not finish building the house but did complete part of it, and then the defendant moved in, declared a homestead on the property and refused to

account to the plaintiff. The appellant court properly held that the plaintiff had a right to an accounting but did not hold that the plaintiff had a right to consider there was still a partnership in existence. In the case at bar the plaintiff Siciliano confuses the court's conclusion that plaintiff acquiesced in the exclusion *at the time of the offered return of his investment* with a situation where a mere abandonment took place with no offer to repay the party for his investment. The Trial Court properly held (Record 14805, page 113):

> "2. The partnership of the parties was dissolved by exclusion of the plaintiff because of his breach and acquiescence in such exclusion as of July 1, 1953."

This was an acquiescence in the termination and dissolution by the plaintiff Siciliano by his not objecting to his complete removal from the business and the settlement offered by the defendant American Pacific Dairy Products, Inc. As pointed out in the brief of appellant American Pacific Dairy Products, Inc. at pages 46 and 47, when one partner states to the other that there has been a termination abandonment or breach of the agreement and makes an offer in termination, the other party cannot remain silent and wait until much later and then decide to sue. *Wood v. Gunther,* 89 Cal. App. 2d 718, 201 P.2d 874; *Meherin v. Meherin,* 93 Cal. App. 2d 459, 209 P.2d 36; *Pacific Atlantic Wine, Inc. v. Duccini,* 111 Cal. App. 2d 957, 245 P.2d 622.

The record amply supports the finding of the Court that the plaintiff acquiesced in his exclusion. For example, the plaintiff did not file suit in this matter until September, 1954, over eighteen months after he had

been excluded from the business (Record 14805, page 15). There is nothing in the record to indicate that any time Joseph Siciliano or his employees ever objected to Mr. Norman Thompson taking over management of the business. To the contrary, the key employee of the plaintiff Siciliano, Ernesto Diza, testified that, pursuant to Mr. Thompson's instructions, he turned over everything to Mr. Norman Thompson (Record 14805, page 297). Plaintiff's counsel in the Lower Court admitted this as follows:

> "As to those facts I cannot disagree, as to the fact of effective control in July of 1953; I cannot disagree as to the fact no action was brought or demands made pertinent to this matter until the date this action was commenced. I cannot disagree." (R. 14805, page 461).

IV.

A Partnership Is Not Required to be Dissolved By Court Order Under the Uniform Partnership Act, and It Was Not Error for the Court to Establish a Date Other Than the Date of the Final Court Order As the Date or Dissolution of the Partnership.

The Court at no time ever indicated that it was considering a date of final termination pursuant to dissolution other than July 1, 1953. In the court's opinion, written prior to the final judgment, the court stated as follows:

> "The court, therefore, is of the view that the parties dissolved the partnership as between themselves on July 1, 1953, and that the plaintiff's interest should be determined as of that date without reference to the value of good will of the business." (R. 14805, page 108).

The Court in its final judgment fixed July 1, 1953, as the date of dissolution (R. 14805, page 113).

In the Lower Court counsel for the plaintiff (who are representing the plaintiff on appeal) admitted that the facts of the defendant's termination were undisputed and that it was purely a question of law whether the partnership could be dissolved by the parties without court intervention. Plaintiff's counsel informed the Lower Court he would not disagree that the plaintiff had been completely excluded by the defendant and had not complained or demanded satisfaction prior to bringing this action. Then plaintiff's counsel admitted this case involved strictly a point of law:

> "It is a question of law which I am propounding which I believe to be sound. There has been some confusion in the cases, that I concede, as to when dissolution of one of these agreements actually takes place. I believe the better view is that there can be no dissolution until ordered by a court of competent jurisdiction * * * (R. 14805, page 461)."

The plaintiff Siciliano, in his opening brief, page 24-25, takes the position that a partnership for a fixed term is not disolved by the expressed will of one partner alone. As pointed out in the appellant American Pacific Dairy Products, Inc.'s opening brief, the appellant takes the position that this is not an agreement for a definite term, but rather an informal agreement established by the court to prevent injustice. Even if it were for a fixed term, however, as a matter of law a trial court is not bound to fix a date of dissolution in a contract for a fixed term as of the date of the court's final order. In the case of *Zeibak v. Nasser, supra,* the

California Supreme Court did not state that the only time a court could decree a dissolution was at the conclusion of the court's finding or final judgment. In the *Zeibak* case, *supra,* the California Supreme Court used the time of the entry of the court's finding and not the time of final judgment, and would have used the date of the plaintiff's improper acts as the date of dissolution but was prevented from doing so by an examination of all the lower court's finding of facts which established that dissolution did not occur at the earlier date. The California Supreme Court stated as follows:

> "Although the words in this finding 'and by reason of the conduct of the plaintiff on or about December 11, 1932, as hereinbefore found, by virtue of which said conduct the said plaintiff caused a wrongful disolution of the venture,' considered separately might be said to support defendants' contention [that dissolution should have been decreed as of December 11, 1932], nevertheless, under rules relating to the interpretation of findings, certain language may not be isolated from the entire context, where to do so would place an interpretation upon such finding different from that which would follow from reading of the finding as a whole." [ ] added. (12 Cal.2d. 1, 8)

This shows very clearly that the court was willing to consider the date of breach as being a proper date of dissolution.

This position is well set forth in the recent case of *Vangel v. Vangel,* 116 Cal.App.2d 615, 254 P.2d 919 (1953) which cites the *Zeibak* case and then holds it is proper for the trial court to fix a date of dissolu-

tion 16 months prior to the final judgment. In the *Vangel* case at points [5] and [6] the Court stated:

> "It is, of course, clear that a Court may, because of a breach of the partnership agreement, decree the dissolution of a partnership as of a date prior to judgment. In some cases where the breach is serious and unequivocal the dissolution may be decreed as of the date of the breach. In such cases the misconduct really dissolves the partnership, the Court decree merely giving legal effect thereto. But here the acts of Charles in including excluding leave a blank did not *ipso facto* dissolve the partnership. His acts simply provided grounds for an application to a court of equity for such relief * * * ."

As pointed out in appellant American Pacific Dairy Prod., Inc.'s appellant brief, a dissolution need not be solely by court order by virtue of a cause listed in Guam Civil Code Section 2425, but can be caused by a change of relationship between the parties. This is set forth in Guam Civil Code Section 2423, as follows:

> "The dissolution of a partnership is the change in relationship of the partners caused by any partner ceasing to be associated in the carrying on as distinguished from the winding up of the business."

For an interpretation directly upholding Section 15029 Civil Code of California, which is identical to the above-cited section, and stating that dissolution takes place when any partner ceases to be associated in the carrying on of the business as distinguished from the winding up of the business, see *Meherin v. Meherin, supra,* and *Fooshe v. Sunshine,* 96 Cal. App.2d

336, 215 P.2d 66. See also the cases cited in appellant American Pacific Dairy Products, Inc.'s, brief, pages 47-48.

Certainly the dissolution of a partnership caused by the breach of an agreement occurred at the date of the breach or abandonment by Siciliano.

V.

An Acounting Was Not Necessary for the Period Following the Dissolution and Termination of the Partnership.

The plaintiff admits in his opening brief (Pl. Br. p. 28) that the Lower Court established an accounting as of July 1, 1953, and did not order an accounting subsequent to that date. This was perfectly proper, since the dissolution had already occurred, and the Court was establishing the liquidation. The plaintiff again relies on his previous position that the date of dissolution must be the date of the Lower Court's entry of judgment rather than the date that the dissolution actually takes place, and this has previously been pointed out to be an incorrect rule. In the present case, defendant American Pacific Dairy Products, Inc. submits that the business was dissolved on July 1, 1952, and that if there was a partnership it was a *de facto* partnership which defendant American Pacific Dairy Products, Inc., as the innocent party, had the right to dissolve and then wind up under Guam Civil Code, Section 2431, which states as follows:

> "Unless otherwise agreed the partners who have not wrongfully dissolved the partnership or the

> legal representative of the last surviving partner, not bankrupt, have the right to wind up the partnership affairs: Provided, however, that any partner, his legal representative, or his assignee, upon cause shown may obtain winding up by the Court."

There is no requirement that the injured party in a partnership or joint venture must go to a Court of Equity for dissolution, but they may instead exercise self help as is shown by Guam Civil Code, Section 2431, and the cases cited in defendant American Pacific Dairy Products, Inc.'s brief on page 47. The defendant American Pacific Dairy Products, Inc., did not give notice under the partnership agreement, since no partnership agreement was ever ratified by appellant, and to have given notice under its terms would have been to recognize or impliedly ratify the partnership agreement of the actions of plaintiff Siciliano in deserting the venture.

The plaintiff Siciliano confuses the defendant American Pacific Dairy Products, Inc.'s offer to return to the plaintiff his full capital investment without a deduction for damages, and the taking over of the business in April, 1953, which was an accounting and winding up of the business with the dissolution which took place July 1, 1952.

The plaintiff Siciliano, by his silence for a period of nearly two years from the date of final exclusion and the offer of appellant American Pacific Dairy Products, Inc., of the accounting must be deemed to have acquiesced and accepted such offer. As pointed out previously, plaintiff counsel admits these facts to

be true (R. 14805, 461). This was an offer and acceptance of an accounting in final dissolution and winding up of the partnership and not an acquiescence by the plaintiff Siciliano in the dissolution, since he had already caused the dissolution by his breach. *Wood v. Gunther,* 89 Cal.App.2d 718, 201 P.2d 874.

The plaintiff cites the case of *Rishwain v. Smith,* 77 Cal.App.2d 524, 534, 175 P.2d 55, and *Swarthout v. Gentry* (1934) 62 Cal.App.2d 68, 78, 144 P.2d 38, for the position that *all* of the transactions of American Pacific Dairy Products, Inc., even *after* the date of July 1, 1953, should be made part of an accounting. The above cited cases do not stand for the proposition that assets can be traced after a dissolution and accounting has taken place. The case of *Rishwain v. Smith, supra,* was to determine whether certain property which had been transferred by partnership signature was community property or partnership property. The Court properly held that property which had been placed in the partnership and treated as partnership property should be considered as partnership property, and the partners couldn't avoid transferring the land by a technical legal defense that their wives had not signed the transfer papers. In the case at bar the plaintiff was offered payment for his interest in the partnership in good faith by the partner winding up and must be held to have acquiesced in this offer by not taking action with regard to it.

In addition, there is no evidence in the record to support a finding that any of the funds of plaintiff Siciliano were ever diverted from the joint venture,

and certainly defendant American Pacific Dairy Products, Inc., was justified in using its own funds to expand its business which had been lagging due to defendant Siciliano's refusing answer the letters of appellant American Pacific Dairy Products, Inc., or clarifying the situation so that the plaintiff could go ahead with its program of expansion as originally planned prior to Mr. Siciliano's entry on the scene. Even if defendant's position of an earlier dissolution is not accepted the Lower Courts dissolution and termination date of July 1, 1953, must stand.

VI.

The Lower Court Properly Exercised Its Discretion in Refusing to Appoint a Receiver and Cause a Judicial Sale of the Assets.

The plaintiff cites no authority for his statement that "as a general rule the Courts after an accounting should require the partnership property to be sold. The net proceeds of such sale are then divided among the partners" (Pl. Br. page 31). This is certainly not the general situation which occurs at the demise of a partnership, and the Uniform Partnership Act specifically provides for one partner winding up the business without court intervention. Guam Civil Code, Section 2431. In the ordinary situation one partner does wind up the business and often will continue the business as a sole proprietor, having paid the other partner his share of the business. In this connection, see the cases of *Speka v. Speka,* 124 Cal.App.2d 181, 268 P.2d 129; *Wood v. Gunther, supra; Griffeth v. Fehsel,* 61 Cal.App.2d 600, 607, 143 P.2d 522.

The plaintiff cites the case of *Breedlove v. Breedlove Excavating Co.* (1942) 56 Cal.App. 2d 141, 132 P.2d 239, for the proposition that he is entitled to the appointment of a receiver and a complete accounting of all affairs of the partnership. This case does not hold that a receiver ordinarily should be appointed. In fact, it states exactly the opposite propostion, as follows:

> "It is true that the power conferred upon a Court to appoint a receiver is a delicate one, and must be exercised with caution lest injury be done to the parties and their properties *(Dabney Oil Co. v. Providence Oil Co.,* 22 Cal. App. 233, 135 P. 1155) and the remedy is to be regarded as an extraordinary or harsh one, to be resorted to only in cases where other less onerous remedies are not available (*De Leones v. Walsh,* 148 Cal. 254, 82 Pac. 1047); yet the question is one which is commonly addressed to the sound discretion of the Court, exercised upon all the facts *(Cal. Delta Farms, Inc. v. Chinese American Farms,* 204 Cal. 524, 269 P. 443), and where a finding passed upon conflicting evidence is to the effect that danger is threatened to property or funds, and the appointment of a receiver is made, it is seldom that the reviewing court will hold that the lower tribunal has been guilty of an abuse of the discretion confided to it. *Whitley v. Bradley,* 13 Cal. App. 720, 110 Pac. 596. Indeed, so broad is the discretion of the chancellor to whom the petition is first addressed *(Davies v. Ramsdell,* 40 Cal. App. 432, 183 Pac. 702) that such exercise will be interfered with by an appellate tribunal only in those cases where there has been an arbitrary exercise of the power. *Fox v. Flood,* 44 Cal. App. 876, 187 Pac. 68."

Even if defendant American Pacific Dairy Products, Inc.'s offer of settlement was not considered a binding offer for an accounting which was accepted by the silence of plaintiff Siciliano, the Court was justified in decreeing an accounting on the basis of the evidence before it without the appointment of a receiver or a sale of the assets of the partnership.

The Court properly attempted to grant the plaintiff Siciliano his rights (under Guam Civil Code, Section 2432(c)), based on plaintiff having wrongfully caused the dissolution. This section provides that the partner who has caused the dissolution wrongfully shall have the right to have the value of his interest in the partnership less any damage caused to his co-partners ascertained and paid to him in cash, and to be released from existing liabilities of the partnership, but in ascertaining the value of a partner's interest, the value of good will in the business shall not be considered. The plaintiff in this case was decreed to have a right in cash to the value of his interest in the business, less any value for good will. Certainly there was nothing else in the business other than the plaintiff's original capital investment plus profits to the date of termination. The defendant American Pacific Dairy Products, Inc., has argued that the Lower Court confused the date of dissolution with the date of final termination of the partnership, but certainly the Court was justified, whichever date is proper, in paying to the plaintiff the value of his interest in the partnership as of the date established by the Lower Court without requiring the business to be sold.

VII.

The Court Should Have Awarded Plaintiff Only the Return of His Original Investment Plus a Share of Profits to the Date of Liquidation.

The plaintiff urges that he should have received a share of the profits subsequent to July 1, 1953, and a share of tangible assets of the business (Pl. Br. 32-39).

It is undisputed that the plaintiff did nothing more than invest $15,000 into the partnership in return for a 50% interest. The plaintiff put in no evidence to indicate that there was any value in the business due to an appreciation of real property, and under Guam Civil Code, Section 2432, the plaintiff is not entitled to any amount for good will, since he is the party that wrongfully caused the dissolution. In the case at bar, it is undisputed that the plaintiff Siciliano received as part of the judgment not only his original investment of $15,000, but also one-half of the profits to the date of final termination, plus one-half of the value of any improvements which are said to belong to the business (Record 14805, page 112). The cases of *Zeibak v. Nasser, supra,* and *Gardner v. Shreve* (1949) 89 Cal.App.2d 804, 202 P.2d 322, cited by the plaintiff on page 34 of his brief, merely state that the party at fault in a dissolution does not necessarily forfeit all his rights by causing a dissolution. In the case at bar the defendant American Pacific Dairy Products, Inc. has never tried to declare forfeited all the rights of the plaintiff Siciliano. The appellant American Pacific Dairy Products, Inc. tendered to Mr. Siciliano his

full original investment of $15,000, which was his interest in the partnership as of July 1, 1952, when he caused the dissolution. At that time there had been no profits earned as shown by the books and therefore no profits were offered. From that time forward defendant appellant American Pacific Dairy Products, Inc., has been billed for the salaries of all parties and for all materials and has paid such bills.

Defendant American Pacific Dairy Products, Inc., agrees with the plaintiff Siciliano that he is entitled only to his *pro rata* share of all profits between the date of dissolution and the date of termination (Pl. Br. 35). Plaintiff again makes the mistake of confusing the dates of *dissolution* (July 1, 1952), *with* the *date of final termination* and winding up of the partnership (April 21, 1953) with the date of Court decreed recognition of the dissolution (July 1, 1953). Defendant American Pacific Dairy Products, Inc., and the plaintiff Siciliano both cite the case of *Moseley v. Moseley* (C.A. 9, 1952) 196 F.2d 663, and allied cases for the proposition that the plaintiff is only entitled to his *pro rata* share between the date of dissolution and the final winding up of the partnership. As pointed out in appellant American Pacific Dairy Products, Inc.'s brief, pages 50-54, the plaintiff Siciliano should have been entitled to only 26 per cent of the profits from the period after the date of dissolution of the partnership, which was July 1, 1952, until the offer for final termination and settlement of April 21, 1953. Even if the Court's date of dissolution of July 1, 1953, should be accepted, the plaintiff would only be entitled

to 26 per cent of the profits to July 1, 1953, or 26 per cent of $33,753.49 (Record 14805, pages 110-111). This would mean only a total amount of profits granted to plaintiff of $8,775.90, whereas the Court granted the plaintiff $16,876.75 as profits for this period (R. 14805 p. 112).

The plaintiff Siciliano and defendant American Pacific Dairy Products, Inc., seem to be agreed that plaintiff Siciliano is only entitled to the *pro rata* share of his profits rather than a 50 per cent interest, which he was granted by the Court.

The argument between plaintiff Siciliano and defendant American Pacific Dairy Products, Inc., is as to the date of dissolution and the date of final winding up or termination of the partnership. Plaintiff Siciliano, having invested only $15,000 compared to defendant American Pacific Dairy Products, Inc., investing $42,500, it would seem apparent that whatever date of termination is used, plaintiff Siciliano is only entitled to 26 per cent of the profits to that date.

VIII.

The Lower Court Did Not Err in Failing to Grant Plaintiff Good Will.

The plaintiff Siciliano argues that he was entitled to a payment for good will (Pl. Br. 39).

As previously pointed out, the party who has caused the wronful dissolution of the partnership is not entitled to any payment for good will. Guam Civil Code, Section 2432(c). The plaintiff Siciliano argues, on pages 39-41 of his brief, that the plaintiff Siciliano

was the innocent party to the dissolution. This is squarely against the findings of the lower court which are amply supported by the record as pointed out in Section I of this brief.

CONCLUSION

Cross-appellee-defendant American Pacific Dairy Products, Inc., was forced to take over completely the operation of the business which it had hoped to place under the management of Joseph Siciliano on the Island of Guam because said Siciliano did not manage the business as he had offered to do. The defendant's chief problems have been caused by its attempts to lean over backwards to protect Siciliano. *At most,* defendant cross-appellee American Pacific Dairy Products, Inc., should only be required to repay the original investment of plaintiff Siciliano in the amount of $15,000, plus a *pro rata* share of the profits of Siciliano from the date of dissolution of July 1, 1952, until the date of final winding up of the partnership, which defendant American Pacific Dairy Products, Inc., maintains is April 23, 1953, and which was found by the Court to be July 1, 1953.

Respectfully submitted,

LITTLE, LESOURD, PALMER, SCOTT & SLEMMONS,

BROCKMAN ADAMS,

Attorneys for Appellant and Cross-Appellee.

Nos. 14,805 and 14,806

United States Court of Appeals

For the Ninth Circuit

AMERICAN PACIFIC DAIRY PRODUCTS, INC., a corporation, *Appellant*, vs. JOSEPH A. SICILIANO, *Appellee.*	No. 14,805
JOSEPH A. SICILIANO, *Appellant*, vs. AMERICAN PACIFIC DAIRY PRODUCTS, INC., a corporation, *Appellee.*	No. 14,805
AMERICAN PACIFIC DAIRY PRODUCTS, INC., a corporation, *Appellant*, vs. PACIFIC ENTERPRISES, INC., a corporation, *Appellee.*	No. 14,806

Upon Appeal from the District Court of Guam.

BRIEF OF APPELLEES JOSEPH A. SICILIANO AND PACIFIC ENTERPRISES, INC., IN RESPONSE TO OPENING BRIEF OF AMERICAN PACIFIC DAIRY PRODUCTS, INC., APPELLANT.

JOHN A. BOHN,
P. O. Box 771, Agana, Guam,

WALTER S. FERENZ,
903 First Street, Benicia, California,

Attorneys for Appellees Joseph A. Siciliano and Pacific Enterprises, Inc., a corporation.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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COMMENTS RELATING TO APPELLANT'S STATEMENT OF THE CASE.

Appellant has erred in several instances in his Statement of the Case and has omitted some significant facts. It is Appellee's position that these errors and omissions combine to create an erroneous perspective on the transactions between the parties. In his opening brief Appellee, as Cross-Appellant, set forth what is believed to be an accurate statement of the facts in this case and reference is made to that statement for the details. However, some of the errors and omissions appearing in Appellant's Statement which fail to do equity as to the transactions between the parties are as follows:

A.

The implication is created that Appellee did nothing in connection with the partnership business until after the store on Guam was opened and ready for business and that thereafter Appellant generously sold a half interest in the business to Appellee for Fifteen Thousand Dollars ($15,000.00), whereas the actual investment of Appellant was approximately Forty-Three Thousand Dollars ($43,000.00). Thus, for example, on page 6 of Appellant's Brief it is stated:

> "During this period and before any agreement with the Appellee was consummated, Mr. Thompson acting on behalf of the Appellant, opened the store on Guam on July 22, 1952. (R. 321)"

An examination of page 321 of the Record does not support such a statement and it is perfectly clear from other testimony that Mr. Siciliano and Mr. Thompson

jointly opened the ice cream store and had been working jointly toward this opening for a considerable period of time. Actually, the Record is abundantly clear that the partnership agreement between the parties was the result of years of negotiation and was an absolute necessity insofar as Appellant was concerned because the enterprise had neither manager, employees or money at the time Appellee was admitted into partnership.

As early as 1950 Mr. Siciliano (Appellee here) was helping the president of Appellant corporation to get his venture started. The parties continuously corresponded and for a substantial period of time Mr. Siciliano was managing agent of the Appellant corporation in Guam. The correspondence ultimately matured into the partnership agreement which is the basis of this action. The matter is clearly set forth in Mr. Thompson's (president of Appellant corporation) testimony, starting on pages 249 and 254 of the Record, as follows:

> "Q. And did your correspondence with Mr. Siciliano, starting in 1950, continue right on to June, '52?
>
> A. The correspondence did but the relation ceased in May when he wrote me—let me go back a moment. When I came over in February, 1951, I had never seen Mr. Siciliano. I met him the morning I landed and we introduced ourselves. He took me up to see the Governor. The Governor was the only one I knew on Guam. He took me in to see Mr. Guerrero, Land Commissioner, and Mr. O'Connor and others and he wanted 50 per cent of the deal when he discussed it and I told

him we couldn't give him 50 per cent of the deal. I offered him 20 and when he still wanted 50 I explained to him that none of us had that much. It would have made him the largest stockholder of them all. I don't think he said he would take 20 but I left here thinking he was going to buy stock like the rest of us. On May 12 I heard from him and he had been thinking it over and he was no longer interested in the deal unless it was a 50 per cent deal but he would be glad to help me in any way. I asked him to contact Slaughter or I contacted Slaughter by letter. I don't know whether Mr. Siciliano contacted Slaughter or not even though he had offered to do anything he could to help.

Q. He was never compensated for that assistance?

A. It was just friendliness; at least I thought it was.

Q. He has never presented you with a bill?

A. Oh, no.

* * * * * * *

Q. Was he authorized in 1951 to act as your agent?

A. He was, yes, sir.

Q. Did he look for land for you and write to you about it?

A. He did. * * *''

* * * * * * *

''* * * Q. First, I will show you Plaintiff's Exhibit 1 which purports to be a certified copy of a resolution adopted by the American Pacific Dairy Products at a meeting held on March 2, 1951, appointing Mr. Joseph Siciliano managing resident agent of Guam for the corporation and ask you if that, in fact, occurred on that date?

A. On March 2, 1951? That is about the time I returned to Seattle then.

Q. And this is the official appointment of him as managing agent?

A. Yes, sir. * * *"

In addition to all of the services performed by the Appellee as above set forth, it is equally clear that at the time of the execution of the partnership agreement which is the subject of this action Appellant corporation was insolvent and, hence, unable to get started in business without additional cash. The testimony of the president of the Appellant corporation, Mr. Thompson, starting on page 192 of the Record, sets forth the condition of the Appellant in June 1952 as follows:

"Q. Let me ask you a question a little differently. As of the time that the Dairy Queen of Guam opened what was your total investment in the Dairy Queen of Guam at that time?

A. At the time the Dairy Queen of Guam opened on June 22, 1952, it was approximately $42,500, give or take a few dollars.

Q. That was regardless of any amount contributed by Mr. Siciliano?

A. That is right, yes.

Q. Now, that also was the total amount of your capital, wasn't it?

A. No; we had a thousand or so dollars in the bank.

Q. And that is all you had left?

A. We had $550 stock that had not been paid for.

Q. Was the corporation indebted to the extent of about $8,000 in Guam?

A. That is right, sir.

Q. And the debt was unpaid?

A. It had not been paid but it was not delinquent.

Q. And there was no capital in the corporation to pay the debt?

A. Oh, we called on the stockholders whenever we needed money. We could have gotten the money if that is what you mean.

Q. Did you have any cash in the corporation to pay that debt?

A. We had borrowing ability; we had stockholders.

Q. But you had no cash?

A. No, sir. * * *"

Also, it is equally clear from the Record that Appellee obtained and used employees from his own company to open the store and in fact was not only active but was the dominant factor in getting the ice cream store open. Thus, Appellee's uncontradicted testimony, beginning on page 145 of the Record, reads in part as follows:

"Q. Now after these agreements what did you do?

A. Went right to work and opened up the Dairy Queen. In fact we were working on the opening at that time. I opened it as soon as possible and I worked there for a week or so, broke in the boys, got my best boys down there who knew about ice cream and broke them in on what to do to make and sell ice cream. I got a few pointers from Mr. Thompson before he left and went right to work with them.

Q. You referred to good boys. Are you referring to employees of Pacific Enterprise?

A. Yes.

Q. Did you ever operate an ice cream business before?

A. Oh, I did.

Q. Where?

A. 20th Air Force Base.

Q. Was that on the island of Guam?

A. Yes.

Q. When was that?

A. 1948. We had one of the largest ice cream plants on the island of Guam and I was allowed to sell out of my own snack bar. I had to supply them first.

Q. Had any of these employees you put in the Dairy Queen of Guam any previous experience?

A. They had. (16)

Q. They had worked around ice cream?

A. Yes.

Q. And it was for that reason you chose them, is that correct?

A. Oh, yes.

Q. Now, did you also, at the same time you were breaking in these boys, did you also have one of your key supervisory employees working with you?

A. Joseph Meggo. M-e-g-g-o.

Q. Now, how many snack bar and restaurant operations have you and Joe Meggo operated on the island of Guam?

A. I operated a large cafeteria which fed 2 to 3,000 people a day and I opened nine snack bars, plus the ice cream plant at Harmon Field.

Mr. Phelan. If it please the court, I can't see what those snack bars have to do with the Dairy Queen of Guam.

The Court. Part of your defense is failure to properly operate the Dairy Queen. I think the

purpose of this line of questioning is to establish the competency of operation at the time the snack bar or the ice cream place was opened. Your objection will be overruled.

Q. (By Mr. Bohn). Now, did Mr. Joseph Meggo also act as one of your supervisors when you were running the ice cream plants at Harmon Field?

A. He was supervisor of all the snack bars, also the ice (17) cream plant.

Q. Mr. Joseph Meggo worked with you while you were opening up the Dairy Queen, is that correct?

A. He did.

Q. And did you then turn over the supervision of Dairy Queen to Mr. Meggo?

A. I did.

Q. And did Mr. Meggo in fact supervise the operations of Dairy Queen?

A. He did.

Q. And for how long a period was that?

A. Well, up to when Mr. Norman Thompson took over.

Q. And the man that was in charge of the Dairy Queen until Mr. Norman Thompson took over was Mr. Joseph Meggo, is that correct?

A. That is right. * * *"

B.

Likewise, the Statement of the Case by Appellant, beginning on page 6, with regard to the respective investments of the parties does not provide a fair basis to judge the equities of the situation. It is true that the president of the Appellant corporation did testify that the Appellant corporation had actually expended

some Forty-Two Thousand Five Hundred Dollars ($42,500.00) prior to execution of the contract with Appellee. However, Appellant's Statement of the Case omits reference to the fact that some of the money had been unwisely spent and did not represent a true value of the assets. The Record of Mr. Thompson's testimony on page 268 contains the following statement on this subject:

> "* * * In doing business with Joe, Joe said, 'You paid too much for the building.' I said, 'I think so too,' so we cut it down for a meeting of the minds, your Honor, * * *"

So, also, the testimony of Mr. Thompson on the same subject, beginning on page 268 of the Record, reads in part as follows:

> "Q. As you started out with your partnership agreement you had a capitalization of $38,000, whatever it is, which represents $15,000 of yours and $15,000 of Siciliano's and the balance was reflected in debts?
>
> A. No; the balance is excess in value that was turned in and it was to come to us.
>
> Q. But there was the $8,000 in debts? (154)
>
> A. No; $8,000 debts to American Pacific.
>
> Q. I am getting argumentative about the debt. I apologize to the court. Isn't it a fact that at the time you made this deal Dairy Queen of Guam owed Overseas Construction?
>
> A. We owed Overseas Construction about $5,000. We might have owed other creditors; I don't know.
>
> Q. So the real capitalization at that date was about $35,000?

A. No, sir; $38,000.

Q. The partnership paid it to you and you paid the bills?

A. Yes; same thing.

Q. In other words, the net worth was roughly $30,000?

A. *No; roughly $33,000.*

Q. You started the Dairy Queen then under the partnership agreement with a net worth of roughly $33,000?

A. That is right, yes.* * *" (Emphasis added.)

Actually, the testimony on this particular matter may be superfluous since the signed Supplemental Agreement between the parties clearly specified the investment understanding. This agreement, which appears in full beginning on page 51 of the Record, supplements the partnership agreement between the parties and insofar as the capitalization is concerned, the significant portions read as follows:

"* * * Witnesseth:

Whereas, the Party of the First Part has prior hereto expended Thirty-eight Thousand Twenty-six Dollars and No Cents ($38,026.00), in connection with activating a Dairy Queen store in the territory of Guam; and * * *"

It is perfectly clear from the foregoing agreement and from a fair summary of all the testimony in the case that the true net worth of the partnership business at the time of its commencement was computed by the parties to be and actually was Thirty-Eight Thousand Twenty-Six Dollars ($38,026.00), less an account payable to a construction company in the

amount of Six Thousand One Hundred Fifty Dollars and Fifty-Seven Cents ($6,150.57) or a true net worth of Thirty-One Thousand Eight Hundred Seventy-Five Dollars and Forty-Three Cents ($31,875.43). It is equally clear that for a one-half interest in these assets Joseph Siciliano, the Appellee here, paid Fifteen Thousand Dollars ($15,000.00) or very close to one full half of the actual value of the assets before the execution of the partnership agreement. By the execution of the partnership agreement and the Supplemental Agreement above referred to, the accounts payable of the venture were increased from Six Thousand One Hundred Fifty Dollars and Fifty-Seven Cents ($6,150.57) to Eight Thousand Twenty-Six Dollars ($8,026.00) so that the net worth of the venture at this point became Thirty Thousand Dollars ($30,000.00) and the Fifteen Thousand Dollars ($15,000.00) paid by Mr. Siciliano represents exactly one-half of said net worth.

If any additional evidence were needed, one only needs to turn to paragraph 5 of the partnership agreement (Record, page 9) which reads as follows:

> "* * * 5. Capital Contributions. Each of the parties hereby contributes to the capital of the partnership the following respective amounts:
>
> First Partner.....$15,000.00
>
> Second Partner .....$15,000.00 * * *"

The general assumption of the Appellant here is that its board of directors had the right to accept or reject the partnership contracts at any time they chose, regardless of the reliance upon them by all

other parties. It is this general contention on the part of the Appellant, as emphasized in the entire statement of Appellant's case, that forces the Appellee to question the good faith of Appellant in all of its dealings with the Appellee and with the public.

It is clear that the president of Appellant corporation had been in and out of Guam since 1950, seeking to place an ice cream store in operation there. The Record is replete with reference to conversations had with the Governor, with the Director of Commerce and with other public and private citizens in that territory. There is no hint that any one in Guam was ever informed that the president had only limited authority and in fact in June of 1952 he signed a series of contracts and documents for and on behalf of Appellant corporation, as follows:

a. Partnership contract with Joseph Siciliano (Record, page 8);

b. Supplemental Contract with Joseph Siciliano (Record, page 51);

c. Assignment of Lease of Real Property from American Pacific Dairy Products, Inc., to the co-partnership (Record, page 54);

d. Certificate of Co-partnership Transacting Business under a Fictitious Name (Record, page 58);

This document (item "d" above) which recites the existence of the co-partnership with Mr. Siciliano as a co-partner was filed with the Department of Finance of the Government of Guam and on page 144 of the Record there was admitted in evidence Plaintiff's

Exhibit Number 6 which was a certificate dated August 21, 1952, signed by the Director of Finance, indicating that the Certificate of Co-Partnership Transacting Business Under a Fictitious Name was received on August 1, 1952, and entered as Document Number 23 in the records of Guam. Furthermore, as of the date of the trial of this action this Certificate of Co-Partnership Transacting Business Under a Fictitious Name had never been cancelled or modified so that the public records of Guam still indicate the existence of such co-partnership. In this connection Mr. Thompson, president of the Appellant corporation, testified as follows:

"* * * Q. Do you have a cancelled certificate of co-partnership agreement filed with the Government of Guam?

A. No.

Q. To your knowledge is that still in existence?

A. I haven't the slightest idea.

Q. Is it possible the public, at least, thinks this is still a partnership operated by American Pacific Dairy and Joseph Siciliano?

A. I don't think the public would go down and read the articles of incorporation. I don't know what the public believes.

Q. I am stating that this was a partnership and you were doing business under the fictitious name of Dairy Queen of Guam——

A. I didn't cancel that. I said that before. * * *" (Record, page 240.)

e. Letter dated June 21, 1952, directed to Major H. W. Grossman, Post Exchange Office, Ander-

son Air Force Base, in which it was stated that the organization was composed of a co-partnership, consisting of, among others, Mr. Joseph Siciliano.

In connection with this document Mr. Edward Thompson, president of Appellant corporation testified on page 258 of the Record, as follows:

"* * * Q. Did you on or about June 21, 1952, join in a letter (143) with Mr. Siciliano directed to Major H. W. Grossman, Post Exchange Office, Anderson Air Force Base?

A. We did, yes.

Q. Did you in that letter state to Major Grossman that you were making a proposition to him about operating a dairy business on the field and did you state that this organization will be a co-partnership composed of Joseph Siciliano and Edward Thompson with, perhaps, several other partners, but in any event all of the majority interest would be Joseph Siciliano's and Edward Thompson's?

A. Yes, I did.

Q. You go on to state that if there is something on Anderson Air Base other partners might come in?

A. That is right.

Q. But you represented to Major Grossman that this was going to be a partnership?

A. That is right, yes. * * *"

All of these documents are complete on their face, representing a concluded transaction, and none of them contain the slightest reference to the fact that

they are subject to any ratification or any further action by the Appellant corporation.

The statement of Appellant's case does not refer to all of the foregoing documents but confines itself to a recitation of the various acts taken or not taken by the Appellant corporation. According to Appellant's statement the documents were received in Seattle in the middle of July 1952 and were presented to the directors in August 1952. No action was taken on them at that time and neither the Appellee nor the government nor the people of Guam were notified that the president had acted without authority. Although still in possession of these documents Appellant continued to do nothing until October 6, 1952, when it adopted a resolution unilaterally without the consent of its co-partner, stating in effect that it would only ratify the agreement upon Mr. Siciliano meeting certain conditions, none of which he was required to meet by the terms of the agreement. Even at this late date neither the public in Guam nor the government of Guam was notified that Appellant corporation did not consider itself bound by these contracts and one can only speculate as to what would have happened had the business failed. Certainly the creditors and others in Guam were not given any warning as to the position of the Appellant herein. NOWHERE IN THE ENTIRE RECORD OF THIS CAUSE IS THERE THE SLIGHTEST EVIDENCE THAT THE BOARD OF DIRECTORS OR THE STOCKHOLDERS OF APPELLANT CORPORATION EVER NOTIFIED ANY-

ONE THAT THEIR PRESIDENT WAS ACTING BEYOND THE SCOPE OF HIS AUTHORITY.

It is at this point also that Appellee is forced to question the integrity of Appellant because on October 9, 1952, the following letter was sent by Mr. Edward Thompson, president of Appellant corporation :

> "* * * Q. LET ME READ YOU SOMETHING AND ASK YOU IF THIS IS YOUR LETTER: 'LAST MONDAY'—DATED OCTOBER 9, 1952—'LAST MONDAY MY ASSOCIATES, HERBERT LITTLE AND GEORGE HENRYE, WHILE DISCUSSING OTHER MATTERS IN WHICH WE ARE INTERESTED *FORMALLY APPROVED THAT AGREEMENT* WHICH I MADE WITH JOE SICILIANO LAST JUNE ON GUAM. (276) THERE NEVER WAS ANY QUESTION ABOUT NOT APPROVING THE AGREEMENT, BUT I PURPOSELY REFRAINED FROM HAVING IT FORMALLY APPROVED ERE NOW, BECAUSE I THOUGHT IT POSSIBLE THAT THE LACK OF APPROVAL MIGHT SOMEHOW SOME TIME HELP JOE IN HIS TROUBLES.' DO YOU STAND ON THAT NOW, MR. THOMPSON?
>
> A. I DID SAY THAT.
>
> Q. DID YOU RECITE THAT?
>
> A. I DID BECAUSE I COULD HAVE FORCED THE BOARD TO RATIFY IT. * * *" (Record, page 379.)

It is this letter and testimony which appellant dismisses in his statement of the case (page 8) with the following language:

> "* * * Several days later a personal letter was sent by Mr. Edward Thompson to the appellee's attorney on Guam, stating that Mr. Thompson and two of the other directors of the appellant, while discussing other matters, had generally approved the agreement. * * *"

Appellant next points out (page 9) "Appellee did nothing with respect to the resolution of October 6, 1952, * * *." Just what was expected of Appellee when he had been advised by the president of the corporation that the contracts had already been ratified is not clear, but the statement of the case goes on to recite that finally and on April 4, 1953, the board of directors of Appellant corporation adopted another resolution which stated, among other things, that it now refused to ratify the contracts. This resolution contained a whole series of self-serving statements, most of which were without any basis in fact and, among other things, sought to terminate the partnership in the following language:

> "2. The de facto partnership heretofore operating the 'Dairy Queen of Guam' is hereby terminated effective April 21, 1954 (1953)."

This is particularly surprising when it is recalled that during all this period of time the business in Guam was being managed under the control of Joseph Siciliano's agents and employees and the business had been making a very substantial profit each month. Perhaps this profit is the real reason why in the same resolution the directors of Appellant corporation offered to return the original investment of Appellee,

providing he signed what in effect were complete releases of all of his interest in the business.

D.

In discussing the management of the store in Guam Appellant's statement of the case at several points refers to Mr. Edward Thompson's activities during the period of time the store was under the management of Mr. Siciliano's employees, with the implication that Mr. Thompson himself was part of the management of the business. This is not an accurate statement of the fact. On page 330 of the Record Mr. Thompson described his capacity during this period, as follows:

> "Q. (By Mr. Phelan). Did you act for Dairy Queen of Guam in the States as their purchasing agent or what capacity?
>
> A. I was the purchasing agent. That is all that I did, yes.
>
> Q. You placed orders and saw to the paper work?
>
> A. Yes, saw they got on board ship—that sort of thing—paid the bills and sent all the documents to Guam. * * *"

During this same period of time the daily management of the business on Guam was under the direction of a Mr. Joseph Meggo, who was an employee of Pacific Enterprises, Inc., which was owned and controlled by Mr. Siciliano, and an experienced supervisor of businesses engaged in the sale of ice cream and food products. Mr. Meggo's testimony on this point is in part as follows:

"* * * Q. When did you first start performing any services in connection with the Dairy Queen of Guam?

A. When Mr. Thompson and Mr. Siciliano opened up the Dairy Queen I was helping out, bringing supplies down and all that. I worked up odds and ends, back and forth, a few hours a day, helping Joe and when Mr. Thompson left the island I was Joe's right-hand man for the Dairy Queen four or five hours a day. I even brought his lunch to him. He didn't leave it. His heart and soul was in the Dairy Queen and he showed me the way Mr. Thompson showed Mr. Siciliano and Mr. Siciliano was teaching me the way Mr. Thompson taught Mr. Siciliano.

Q. And you were familiar with the requirements from operating the ice cream plant at Harmon?

A. I was.

Q. You know about bacteria count and so forth?

A. I did.

Q. And you knew how to store ice cream and dispense it?

A. I did.

Q. Now, after Mr. Siciliano left Guam, what service did you continue for the Dairy Queen?

A. He put me in charge of the Dairy Queen and I followed on exactly how he showed me. (38)

Q. How long did that continue with you as manager of Dairy Queen?

A. Well, until Mr. Thompson, Jr., arrived in Guam.

Q. About when was that, do you remember?

A. I can't recall because I was responsible for Pacific Enterprises, too.

Q. You were continuously the manager until Mr. Norman Thompson took over, is that correct?

A. That is right.

Q. How many days a week did you perform services for the Dairy Queen?

A. Seven days a week.

Q. Is that true throughout the entire period?

A. Every day I was at the Dairy Queen. * * *" (Record, page 165.)

The management of this business during this period is best summarized by the following statement of the court (Record, page 316):

"* * * The Court. Well, Mr. Phelan, you have a peculiar theory of abandonment. Where did your money come from? Where did your profits come from?

Mr. Phelan. I don't know.

The Court. Certainly not from an idle operation.

Mr. Phelan. That is true. (209)

The Court. Who ordered the materials? Who served ice cream? Who furnished the reefer? Who furnished the supervision? Who furnished the bookkeeping? Who made the reports?

Mr. Phelan. It wasn't Mr. Siciliano.

The Court. Not individually but it was done and it was done by the employees of the corporation which he headed, which according to the testimony, was interchangeable with him. * * *"

E.

The Appellant corporation also, throughout its statement of the case and in the trial itself, complained about the quality of the management of the

business by Mr. Siciliano's employees. It is true that, as set forth on page 11 of the Appellant's statement of the case, the court did find some unsatisfactory conditions at the store when it was taken over by Appellant corporation, but Appellee contends that such conditions for the most part were simply inherent in transacting business in Guam at this time. Certainly, the situation did not improve with the change in management, and it is an extremely odd coincidence, if it is a coincidence, that during the period of time the business was operated by Mr. Siciliano's employees it made a very substantial profit and almost immediately upon the assumption of management by Appellant corporation the profit diminished and later disappeared altogether to the point that it started to lose money each month, rather than make a profit. It is certainly difficult to contend, as the Appellant does, that it "had to finally completely take over the operations to protect itself" (Appellant's Brief, page 11) when it is noted that this business under the management of the Siciliano organization made in excess of one hundred per cent (100%) profit during one year's operation. As previously pointed out the net assets of the partnership at its commencement was Thirty Thousand Dollars ($30,000.00) and the profit as found by the court (Record, page 110) after approximately eleven (11) months' operation was Thirty-One Thousand Four Hundred Three Dollars and Forty-Seven Cents ($31,403.47). Appellant seeks to overcome this record of accomplishment by stating in substance that business was good during this period of time and then adds that

beginning later in 1953 business conditions in Guam worsened. There is no evidence to support such a statement and it is just as likely that poor management and excessive expenses, such as traveling expenses of the president of Appellant corporation caused the profits to diminish and finally disappear.

So, also, there is considerable complaint throughout this case that Mr. Siciliano was derelict in his duty in not opening another store in Guam to sell additional ice cream products, and Appellant makes considerable point of the fact that it did so beginning in November 1953. Yet the record amply indicates that the opening of this second store was exceedingly bad business judgment. Beginning at page 239, the Record gives the history of the opening of this second store, pointing out that a total of Twenty-Six Thousand Seven Hundred Forty Dollars and Sixty-Three Cents ($26,740.63) was taken from the assets of the partnership for the purpose of opening this new store and that the first expenditure therefor was in November 1953. These expenditures started in November 1953, and it took until September 1954 to actually get the store opened. Furthermore, when the new store did open the existing store immediately began to lose money for the first time and has continued to lose money ever since. On this point the Record, beginning at page 214, reads in part as follows:

"* * * Q. When did Guam Frozen Products open their store? (125)

A. I would say just before September, 1954.

Q. Just before September?

A. Yes, sir.

Q. If I am correct, your previous testimony was that it was in the month of September, 1954, that the Dairy Queen of Guam began to lose money, the first store?

A. I don't think there is any connection there.

Q. Just answer the question.

A. Yes.

Q. Isn't it a fact that for every month since and including September, 1954, the original store has lost money, according to your records?

A. Yes.

Q. Isn't it also true that Guam Frozen Products opened a competing store?

A. That is right; yes, sir.

Q. Do you have any idea what the situation is for January, 1955?

A. Not too good. About the same. We can tell.

Q. When you opened the other store——

A. Well, that isn't the cause of it.

Q. But the fact is that when you opened the other store the sales went down?

A. Yes; we had two drops in sales. We had a drop last spring, too. (126)

Q. This is the first month that the Dairy Queen of Guam ever lost money?

A. That is correct.

Q. But the sign, 'Dairy Queen' is also on the other store?

A. That is right, yes. * * *''

In short, there is a clear indication that all the Appellant did by opening the new store was to divide the business with the one already in existence, and the situation became more aggravated when it is recognized that this new store is owned by an entirely

new corporation in which the Appellant corporation owns stock with others. Thus, the Appellant took part of the assets of the partnership and diverted them to a competing corporation financed almost completely by these diverted assets. Furthermore, there is additional dissipation of the assets of the co-partnership in that the son of Edward Thompson received Five Hundred Dollars ($500.00) per month for managing the existing store and only One Hundred Dollars ($100.00) per month for managing the competing store owned by a different entity (Record, page 243).

F.

Appellant, in its statement of the case, also makes several references to the companion case of Pacific Enterprises, Inc., vs. the co-partnership. The issues in this case are all questions of fact based in some part on a conflict in evidence, but mostly upon admitted statements of fact. It would appear, therefore, that matters involved in this case would be within the discretion of the trial court who had an opportunity to hear the witnesses and form its conclusions as to their credibility. In this connection the record indicates that the court devoted a great deal of time to considering each item of the account separately and voluminous testimony was taken on all disputed items.

However, it is significant to note that nowhere in the statement of Appellant's case does it refer to the fact that although Joseph Meggo, as supervising manager, and Henry Diza, as bookkeeper, performed services by the partnership but were in fact paid by

Pacific Enterprises, Inc. It is true that in the case of Pacific Enterprises, Inc. versus the co-partnership request was made of the court to provide for the payment of salaries to these persons for services rendered to the co-partnership, but this the court declined to do, presumably on the theory that this was a contribution by Mr. Siciliano in lieu of other management services. This is in accordance with Appellee's theory of this case which contends that even if Mr. Siciliano were obligated to manage the business (which the contract does not require), he fully performed these management services through these qualified employees. It should be especially noted, however, that the Five Hundred Dollar ($500.00) per month fee which the partnership agreement provides for in the event he is managing the business was not included in the judgment awarded to him on the dissolution of the partnership.

ARGUMENT.

I. INTRODUCTORY.

Appellee's theory of this case is set forth in some detail in an Opening Brief filed by Appellee as a Cross-Appellant in the case of *Joseph A. Siciliano v. American Pacific Dairy Products, Inc.,* which was, as therein indicated, an action to dissolve a partnership in accordance with the laws of Guam. In responding to Appellant's Brief, Appellee presents the following arguments in opposition to said brief and to support his theory of this case.

II. CONFLICT OF LAW PROBLEMS.

In item number I and throughout its Opening Brief Appellant makes considerable point of its contention that there are substantial problems of conflict of law involved in this cause. Appellee cannot agree with this contention. In its essence the action is a simple one. Plaintiff and Defendant executed a partnership agreement in Guam to be performed in Guam and action for dissolution of the said partnership was commenced in Guam. Thus, the place of execution, the place of performance and the place of forum are all located in the territory of Guam.

Appellant, however, contends that even though the partnership contract was executed in Guam by the president of Appellant corporation, this was not within the scope of his authority and, hence, required ratification by the board of directors. Appellant then contends that since such ratification is required, the law of the place of making the contract would be in Seattle, Washington, because that was the home office of the corporation, even though it was organized for the sole purpose of doing business in Guam and was in fact authorized to do business in Guam as a foreign corporation.

From this Appellant draws the conclusion that the laws of the State of Washington govern both the authority of the president to enter into a partnership contract and the authority of the corporation itself to execute such an agreement without authority to do so in its Articles of Incorporation. Having sought to establish this point, Appellant then says that there are no cases in the State of Washington on either of

these subjects which would seem to leave the question right where it started. The question would, therefore, seem to be much more clearly presented under general principles of law which are as applicable to Guam as they are to the State of Washington.

Admittedly, there is some conflict in the authorities as to whether the law of the place of contracting or the law of the place of performance governs the interpretation of a contract, but it is suggested that the better rule applies the law of the place of performance particularly where, as in the case at bar, there is no showing that there is any difference in the statutes or case law of the two jurisdictions.

The territory of Guam has adopted the Uniform Partnership law as part of its codes which are generally patterned after the laws of California using in many instances the same section numbers as the comparable statute in California at the time the Guam Codes were adopted. This was done in Guam and is presently maintained there so that decisions of the highest courts in California would be persuasive authority on the interpretation of the Guam Law (*United States v. Johnson* (1950) 181 F. (2d) 577). It would, therefore, seem appropriate to look to the law of Guam and of California for the decisive factors in this case.

Both California and Guam adopt the rule that a contract is to be interpreted in accordance with the law of the place where it is to be performed. See 11 Cal. Jur. (2d) Sections 61 and 62 and Guam Civil Code Sec. 1646 reading as follows:

"§1646. A contract is to be interpreted according to the law and usage of the place where it is to be performed; or, if it does not indicate a place of performance, according to the law and usage of the place where it is made."

III. THERE WAS A JOINT VENTURE OR PARTNERSHIP BY RATIFICATION OR ESTOPPEL BETWEEN THE PARTIES AND THEIR RIGHTS AND LIABILITIES ARE TO BE DETERMINED IN ACCORDANCE WITH THE WRITTEN AGREEMENT BETWEEN THEM.

Appellee concedes that in the instant case there is no statute in Guam which authorizes the President of a corporation to enter into a partnership contract and further concedes that the Articles of Incorporation of the Appellant corporation do not contain that express power. However, assuming that this prevents the consummation of a formal partnership, the only effect on the case at bar is one of terminology.

The fact is that an agreement designated as a partnership agreement was entered into between the parties and relying thereon Appellee invested substantial time and money. The fact also remains that the business venture arising out of this contract made substantial sums of money, a large portion of which was due to the intervention, aid and assistance of Appellee. All of this profit and all of the assets of the venture have been confiscated by the Appellant. Certainly, the law does not leave the Appellee without a remedy in this situation.

The rule is well set forth in the California case of *Mervyn Investment Company v. Biber* (1921) 184

Cal. 637, 194 P. 1037. In this case an original partner assigned his rights and liabilities under a written partnership agreement for a fixed term to a corporation. The Appellant in the case was the other original party to the partnership and by the agreement was given the right to acquire a one-third interest in the partnership assets by fulfilling his duties thereunder. The new corporate partner asserted the right to dissolve and thereby cut off Appellant's rights in the partnership contract, basing its right to dissolution upon the lack of corporate power to be in a partnership. The trial court sustained this position, but this decision was reversed by the Supreme Court of California which held that the Appellant was entitled to his rights under the terms of the partnership agreement, despite the fact that the corporation and Appellant were not actually partners. The language of the court at page 643 reads in part as follows:

> "* * * Even where a corporation is without authority under its charter to form a partnership with another, it may be held liable as a partner to prevent injustice. * * *"

And also,

> "* * * It is not necessary to a decision of this case in Appellant's favor that it should appear that Plaintiff corporation became a partner with Appellant upon Werner's transfer to it of his interest. * * *"

And on page 644 the Court also stated,

> "* * * It is entirely clear that the Plaintiff (corporation) by accepting this assignment under the

> express conditions of the original contract is in no better condition than Werner would have been after a voluntary withdrawal from the partnership. * * *"

Beginning on page 39 of its brief, Appellant concedes that it cannot avoid partnership liability and in fact states that it is willing "to meet its just obligations to the Appellee due to his reliance on the appearance of a partnership arrangement". The simple question remaining, therefore, is what is the measure of Appellant's liability, and it is the contention of the Appellee that whether the relationship between the parties be considered a partnership by ratification or estoppel or a joint venture agreement, the rights and obligations of both parties are fixed by the terms of the agreement between them.

In this sense this action resembles an action in the nature of *assumpsit* where a plaintiff chooses to sue on one of the special counts. In such actions the contract between the parties is admissible as an admission of the standard of value or proof of any other fact that determines the plaintiff's recovery (*Castagnino v. Balletta* (1889) 82 Cal. 250, 23 P. 127; *Naylor v. Adams* (1911) 15 Cal. App. 548, 115 P. 335; *Sessions v. Pacific Imp. Co.* (1922) 57 Cal. App. 1, 206 P. 653).

Although dissolution and winding up of a partnership is not in the nature of *assumpsit,* the reason for adhering to the terms of the written contract are equally persuasive since there must be some measure

of the rights of the parties, and the signed contract is the best evidence of the agreement between them.

Furthermore, Guam Civil Code Section 355 reads in part as follows:

> "* * * Any contract or conveyance made in the name of a corporation, which is authorized or ratified by the directors, or is done within the scope of the authority, actual or apparent, given by the directors, shall bind the corporation, and the corporation shall acquire rights thereunder, whether the contract be executed or wholly or in part executory."

It is submitted by the Appellee that the case at bar falls squarely within the provisions of this code section in two respects. First, that the contract was either actually or impliedly ratified by the directors of the Appellant corporation or they are estopped to deny such ratification and therefore estopped to deny the existence of the contract. Second, in any event the execution of such contract by the president of the corporation was within the apparent authority given by the directors to said president.

A. The contract between the parties was ratified by the directors of Appellant corporation.

On October 9, 1952, the president of the Appellant corporation wrote to Appellee as follows:

> "October 9, 1952 * * * 'Last Monday my associates, Herbert Little and George Henrye, while discussing other matters in which we are interested, *formally approved that agreement* which I made with Joe Siciliano last June on Guam. There never was any question about not approv-

> ing the agreement, but I purposely refrained from having it formally approved ere now, because I thought it possible that the lack of approval might somehow some time help Joe in his troubles.' * * *'' (Record, page 379.) (Emphasis added.)

The conclusion is inescapable, therefore, that either the president of the corporation deliberately misled and defrauded the Appellee or he was correctly stating the real action taken by the corporation. If he was correctly stating the real action of the directors of the corporation, then there was in fact a formal ratification of the contract in spite of the fact that a resolution of the corporation dated October 6, 1952, stated to the contrary. On the other hand, if such resolution reflects the true action of the corporation, then the Court should not lend itself to a fraud by the corporation's president which misled Appellee as to the action of the corporation. The evidence is clear that the president continues to manage the affairs of the corporation and the acquiescence of the board of directors of the corporation in his activities would make the corporation party to the fraud.

Thus, in the case of *Simmons v. Ratteree Land Co.* (1932) 217 Cal. 201, 17 P. (2d) 727, it was held that a land company which retained sales agents in its employ after knowledge of their fraudulent practices became a guilty party to their fraud.

Appellant claims that this letter was improperly admitted into evidence (App. Br. p. 35) apparently on the theory that its only relevancy was to estab-

lish the authority of the president as agent of the corporation. Appellee does not understand the materiality of this argument. The letter was offered and admitted for two purposes. One, to impeach the president who had testified that the Board of Directors had not ratified the contract. Two, as an admission by the highest corporate officer as to what the Directors actually did. The letter of the president (himself a member of the Board of Directors) was directly in contradiction to what purported to be a resolution of the Board at the same meeting. Both were sent to the appellee with *the letter being the later of the two communications.* It would certainly appear relevant to the cause and it seems clearly within the authority of a president of a corporation to report what the Board of Directors did at a meeting.

In any event the directors of the corporation have *impliedly ratified* the action of its president in signing the contract through their acquiescence and silence as to his activities. There is no evidence whatever in the case that the directors have ever repudiated the authority of the president of the corporation and no evidence whatever that they have ever notified either the Appellee or any one else that he did not have authority to execute agreements. In addition to this, of course, the corporation has accepted all of the benefits of the contract. The rule is well set forth in *Ballantine on Corporations,* as follows:

> "§60. If the officers of a corporation or other persons assume to act for the corporation without any authority at all, or if they exceed their authority, or act irregularly, the act may be ex-

pressly or impliedly ratified by the board of directors, and rendered binding, except as to intervening rights of third persons. In this respect, a corporation is subject to substantially the same rules as an individual. * * *

"A contract made or other act done by an officer or officers of a corporation without authority may be ratified by acts or tacit acquiescence. It need not be by formal vote of the directors or shareholders, as the case may be; but, as in the case of ratification by a natural person, it may be by parol assent, or may be implied from the consent of the shareholders, or of officers having authority to ratify, in accepting the benefits with knowledge of the facts, or otherwise treating or recognizing the contract or act as binding; and under some circumstances it may be implied from a mere failure to repudiate or disaffirm."

In this action the facts show that the officers and directors of the Appellant corporation not only knew of the fact of the partnership agreement and its execution by Mr. Edward Thompson, they also knew of the terms and conditions thereof. The capital contributions of the Appellee were accepted, his ability and influence were utilized, and his agents and employees, through Pacific Enterprises, Inc., supplied the labor to open and run the partnership business during the formative months. Substantial profits were made and were confiscated by the Appellant corporation while in possession of all of the above facts. During this time there was no repudiation of the contract nor was there an express disaffirmance of the president's power to enter into such an agreement on

behalf of the corporation. It is true that in April 1953 the corporation made an attempt to repudiate the contract but such act was over six months after it had purported to "conditionally ratify" the agreement and over ten months after the execution of the contract. Appellee contends that if the Appellant corporation wanted to repudiate the contract on any grounds, it was under an implied duty to do so shortly after having acquired knowledge of all the facts. Failing to do so, and subsequently accepting the benefits of the partnership business, it impliedly, if not actually, ratified the agreement and became bound by its terms. Any subsequent action must necessarily be ineffectual to dissolve the partnership unless in accordance with the terms of the agreement.

Furthermore, the corporation should be estopped from denying that it is bound by the terms of this contract. Estoppel is as applicable to corporations as to individuals. (See *Aigeltinger, Inc. v. Burke* (1917) 176 Cal. 621, 169 P. 373; *Gribble v. Columbus Brewing Co.* (1893) 100 Cal. 67, 34 P. 527; *Newhall v. Joseph Levy Bag Co.* (1912) 19 C.A. 9, 124 P. 875).

The latter case clearly sets forth the law, as follows:

> "* * * It is a fact of common knowledge that a very large part of the mercantile business of the country is, as a matter of convenience, if not, indeed, as matter of necessity, carried on by corporate organizations rather than by partnerships. It would greatly hamper their usefulness if all the daily current purchases and

sales of merchandise could be made only by resolution of directors or that the public dealing with their officers would do so at the peril of having their contracts repudiated when they might happen to be unfavorable to the corporation, or less profitable than was anticipated when made. Suppose an incorporated mercantile house of San Francisco should, in its corporate name, signed by its secretary, and on the verbal authority of the president and one other of the five directors, cable an order to a Paris house for a bale of drygoods of a kind and value previously purchased from the latter by the former. Must the Paris house demand and receive an authenticated copy of a resolution by the board of directors of the San Francisco house authorizing the order for goods before the Paris house could safely fill the order? Suppose the Paris house should ship the goods, and on arrival it happened that they had depreciated in value and the San Francisco house repudiated the contract, claiming their right to do so under the rule now contended for. A system of law that would tolerate such an evasion of responsibility would be unworthy of a civilized people. * * *"

"'* * * The law is well settled that a principal who neglects promptly to disavow an act of his agent, by which the latter has transcended his authority, makes the act his own (*Breden v. Dubarry,* 14 Serg. & R. (Pa.) 30); and the waiver which makes the ratification equivalent to precedent authority is as much predicable of a corporation as it is of ratification by any other principal; and it is equally to be presumed from the absence of dissent. (*Gordon v. Preston,* 1

Watts, 387, (26 Am. Dec. 75).)' Quoting from *Bank of Pennsylvania v. Reed,* 1 Watts & S. 101, the court said: 'When the principal has been informed of what has been done, he must dissent and give notice of it in a reasonable time; and if he does not, his assent and ratification will be presumed. * * * Nor was it necessary, in order to bind the bank by their acquiescence, that notice should have been given to the directors, when sitting in their official capacity as a board. If they were personally cognizant of the offer made by the cashier, it was their duty to call a meeting of the board and disavow the act, if they were unwilling that the bank should be bound by it. It would be unjust to permit the plaintiff to spend his time and money for the detection of the thief, on the faith of the promised reward, and then repudiate the offer, as unauthorized, when he had succeeded. * * *' ''

B. The execution of contract with Appellee was within the apparent authority of the president.

In his comments on Appellant's statement of the case Appellee has quoted from the Transcript at great length, indicating some of the activities of the president of Appellant corporation which clearly establishes his apparent authority to execute this contract, even though it not be interpreted as a formal contract of partnership. It would, therefore, unduly extend this brief to repeat those actions here, except to point out that for a period beginning in 1950 and continuing to the date of the trial of this action no other person dealt with the affairs of this corporation

in Guam except the president. It is quite apparent that actions of the board of directors of this corporation were *pro forma* in nature and that its activities were dominated by its president. The situation is best exemplified by a quotation from the transcript at page 380 when the attorney for the Appellee asked the president of Appellant corporation to explain why he had written a letter to Appellee stating that the contracts had been ratified, even though the board of directors had purportedly adopted a resolution to the contrary. His answer was as follows:

> "Q. Did you recite (sic write?) that?
> A. *I did because I could have forced the board to ratify.*" (Emphasis Added).

IV. THE TERM OF THE PARTNERSHIP BY ESTOPPEL OR JOINT VENTURE BETWEEN THE PARTIES, AS WELL AS ALL OTHER DETAILS OF THEIR RELATIONSHIP, IS FIXED BY THE AGREEMENT BETWEEN THE PARTIES.

Beginning on page 40 of its brief, Appellant undertakes a series of arguments which start upon the assumption that the joint venture or partnership was dissolved (a) on July 2 (approximately a week after it started) by a breach of the Appellee, (b) that even if this breach did not cause dissolution (Appellant's Opening Brief, page 44), the enterprise was dissolved by notice and (c) through the silence and acquiescence of the Appellee.

It is Appellee's position that none of these contentions have merit for the following reasons:

A.

Appellant contends that Appellee breached the agreement by leaving Guam in July, 1952 and contends that this act caused the dissolution of the partnership as of that date. (Appellant's Opening Brief, Page 40 et seq.). *Apparently, the Appellant takes the position that the Articles of Co-Partnership executed by and between the parties hereto are binding contractual promises, but only insofar as duties and liabilities are created on the part of the Appellee, Mr. Joseph Siciliano.* As an elemental rule of the law of contracts, an agreement must be mutually binding upon both parties, or it is binding on neither (Restate., Contracts, Section 80).

Appellee contends that the Articles of Co-Partnership created a binding and contractual relationship between the parties hereto in the nature of a partnership, and that the basic issue as raised by the trial below is (1) whether or not Section 8 of said agreement requires the Appellee to manage the partnership business, (2) whether or not, assuming such duty does exist, his physical presence is implied by or expressly necessary to fulfill such duties, and (3) whether or not the Appellee did manage the business by delegation to his agents and employees, and the performance thereof was accepted by Appellant. Furthermore, Appellee contends that, under the facts as found by the trial court, the Appellant, by its wrongful exclusion of Appellee from the partnership and refusal to recognize any of his rights therein, and by its secret and wrongful diversion of partnership funds into a

competing business, wrongfully caused the dissolution of the partnership under the applicable provisions of the Uniform Partnership Act as enacted on Guam. In support of the foregoing, Appellee refers to his argument thereto beginning on page 11 of Appellee's Opening Brief as cross-appellant.

Appellant contends that because Appellee left Guam on July 2, 1952, he breached the agreement and thereby caused a *pro tanto* dissolution (Appellant's Opening Brief, Page 41). Appellant contends that the trial court found this breach as a fact and, therefore, should determine all rights as of that date. The trial court did find that Appellee breached the agreement as of July 2, 1952 but that no damage resulted from said breach. Furthermore, Appellee contends that said finding is a mere conclusion of law based upon an erroneous interpretation of the agreement between the parties. That Appellee left the island of Guam on said date is not disputed; the issue lies, not in a question of fact, but a question of law to wit: Was this leaving inconsistent with the terms of the contract and the intent of the parties, as shown by said contract? (Guam Code of Civil Procedure, Section 2102; *Coots v. General Motors Corp.* (1934) 3 Cal. App. 2d 340, 39 P.2d 838).

As pointed out in his Opening Brief as Cross-Appellant, Appellee contends that there is neither authority in law nor in the contract for holding that he breached his agreement merely by leaving Guam on July 2, 1952. Certainly, the contract does not say that Appellee cannot leave Guam during its existence,

which is for a period of fifty (50) years, at any time under any circumstances. To contend otherwise would be to advance the absurd contention that Appellee by the execution of this agreement sentenced himself to fifty (50) years on this island which is only approximately 30 miles long by 12 miles wide.

Nor does the law recognize any such proposition. The absence from the state of one partner does not constitute an abandonment of the business to the co-partner. See *Carrie v. Cloverdale Co.,* 90 Cal. 84, 27 P. 58; also see *Lampher v. Washauer,* 28 C.A. 457, 152 P. 933, which holds that the absence of one partner for a temporary period from the partnership, even though contrary to the partnership agreement, does not dissolve the partnership and, further, that a partner by his mere absence does not abandon the partnership and does not lose his right in equity for an accounting and settlement. Also see *Bernheim v. Porter,* 2 Cal. Unrep. 349, 4 P. 446, as authority for the proposition that the absence from the state of one partner does not work a dissolution of the partnership.

B.

As to termination of the relationship of the parties by notice, even the Appellant is not quite sure as to when this notice was given and when it was supposed to be effective. A so-called "conditional ratification" was purportedly adopted by the board of directors of Appellant corporation on October 6, 1952, but whatever else this document was, it was certainly not a notice of termination of relationship. In addition to

this factor, the notice was followed within three or four days by a letter from the president of Appellant corporation, advising Appellee that the contracts had been formally approved and ratified by the board of directors. The other so-called notice of termination was in April 1953 and constituted a unilateral action by the Appellant corporation. This notice simply declared the venture terminated and offered Appellee back his original investment, conditioned upon his release of his rights in the venture. There is no suggestion in any of these communications or in any subsequent communication that the assets of the venture were to be sold and the proceeds distributed to the parties or that the profits to date were to be divided. IN OTHER WORDS, THE SO-CALLED NOTICE OF APRIL 1953 MEANT IN SUBSTANCE: WE WENT INTO A VENTURE, IT IS PROFITABLE AND WE ARE GOING TO TAKE OVER ALL THE ASSETS AND KEEP THE PROFITS. IF YOU AGREE TO THIS WE WILL RETURN YOUR ORIGINAL INVESTMENT, BUT WILL GIVE YOU NOTHING FOR YOUR TIME, YOUR EMPLOYEES OR YOUR RISKS.

Appellee believes that, since the partnership was one for a fixed term, the only way that the partnership could be dissolved outside of court, was under the terms of the Articles of Co-Partnership, or by mutual agreement between the partners.

Because the agreement between the parties is expressly a partnership for a fixed term (Section 3,

Articles of Co-Partnership), and because a lease of real property is among the partnership assets, Appellant cannot terminate the relationship between the parties by mere notice. (*Zeibak v. Nasser* (1938) 12 Cal. 2d 1, 82 P. 2d 375, *Bates v. McTammany* (1938) 10 Cal. 2d 697, 76 P. 2d 513.)

If Appellant wanted to terminate this contract by notice a way is provided in the partnership agreement as follows:

> "12. Option of One Partner to Retire. In the event either party should desire to retire from the partnership, he shall give the other party written notice of his intention so to do and the remaining partner shall have an option for the ninety (90) days, next ensuing the receipt of such notice, to elect to buy out said retiring partner and acquire sole ownership of the business of Dairy Queen of Guam in the following manner:
>
> a. An inventory shall be taken on a day to be mutually agreed upon by the partners, and the interest of the retiring partner shall be determined from such inventory and in the manner customarily employed by the firm in preparing its financial statements, with the exception that good will shall be reflected as an amount equal to two and one-half (2½) times the net profits of the firm for the twelve (12) calendar months immediately preceding the said inventory date, after allowing six per cent (6%) interest on invested capital.
>
> b. Within ten (10) days after the interest of the retiring partner shall have been determined in the manner set forth in the preceding paragraph, he shall be paid by the remaining partner

for said interest as follows: one-third (⅓) in cash or by duly certified check; one-third (⅓) by the remaining partner giving his promissory note for one-third (⅓) of the amount of such interest, payable six (6) months from said date, and bearing interest at the rate of six per cent (6%) per annum; and the remaining one-third (⅓) by giving a further promissory note for one-third (⅓) of the amount of such interest, payable twelve (12) months from said date, and bearing interest at the rate of six per cent (6%) per annum." (Record, pages 11-12).

C.

Appellee finds it difficult to understand an argument that by his silence he acquiesced in the forfeiture of his property. There were several courses open to Appellant if it had in good faith sought to dissolve this venture. It could have given notice as provided by the contract between the parties or it could have brought an action for dissolution. Neither of these courses were followed and the Appellant corporation's directors merely engaged in a frantic series of passing of resolutions, seeking to avoid their liability. There is no showing that they changed their position because of the acquiescence of the Appellee nor is there any showing that his silence led them into any peril or misunderstanding. In view of these facts, to contend that a one-half interest in a profitable business is forfeited merely because the partner or joint venturer does not immediately bring an action is to disregard the statute of limitations which effec-

tively fixes the time within which these matters can be brought to issue.

D.

As heretofore noted, Appellee contends that the rights and liabilities of the parties are fixed by the contract between them, even though this contract be not considered a formal partnership agreement. The law is clear that where the corporate partner is not able to sign a partnership contract, the courts will treat the transaction as a joint venture and will impose exactly the same rules as those that apply to partnership in considering all the relationships between the parties. The general subject of corporations as parties to joint ventures is covered in a note in 80 ALR at page 1049, and many cases are cited. The matter may be simplified, however, when it is recalled that the statutes of Guam were patterned after the statutes of California, and, hence, California cases are persuasive authority for the status of the law in that territory. Two California cases seem to dispose of the matter without further discussion. Thus, in the case of *Zeibak v. Nasser* (1938) 12 Cal. (2d) 1, 82 P. (2d) 375, the law is clearly stated that the rights and liabilities of joint adventurers as between themselves are covered by the same principles which apply to a partnership; and Section 2432 (now Corporations Code, Section 15038) of the California Civil Code (which is identical to the same numbered section of the Guam Civil Code) which relates to the rights of partners on dissolution is not confined in

operation to partnerships, but is applicable in the case of dissolution of joint ventures. The Court stated, among other things, on page 12 the following:

> "* * * The rule is that the rights and liabilities of joint adventurers as between themselves are governed by the same principles which apply to a partnership. * * *"

It is axiomatic that in dealing with partnerships and with all types of contracts the Court seeks to find out first what the parties themselves agreed to do and if there is no specific agreement as to what the parties wanted then must resort to implications and assumptions from their course of conduct. However, where there is a signed contract between the parties, by whatever name it may be known, which clearly sets forth their rights and obligations, then this document obviously is the best evidence and the only evidence of what the parties wanted and intended in their business relationship. It is, therefore, the Appellee's contention that in the case at bar the partnership contract is completely binding between the parties, even though the enterprise be technically known as a joint venture and not a partnership.

This view is supported by the cases and appears to be particularly strengthened by the holding of that portion of *Zeibak v. Nasser* (supra) which seeks to ascertain the term of the joint venture therein referred to. In that case the court found that the agreement between the parties was not entered into for any specific period of time and, therefore, in seeking for

some implied term intended by the parties, used the term of the lease of a theater building as being the intended term of the joint venture. This is not only good law but common sense in that the joint venture being for the purpose of operating a theater could be presumed to be for the term during which the theater was leased.

In the case at bar the court need only to look to the agreement between the parties to ascertain that a fixed term was agreed upon between the parties, but if it were to be contended that such a fixed term went beyond the scope of the particular joint venture in which the parties were engaged, it is abundantly clear from the record that as a part of the partnership agreement the Appellant cause to be assigned to the partnership the lease of the real property upon which the partnership business was and is now conducted (Plaintiff's Exhibit C, Record, page 54). The term of the lease was for five (5) years with an option to renew for an additional five (5) years (Record, page 55), and upon the authority of *Zeibak v. Nasser* (supra), a joint venture wherein an asset consists of a lease of property for the purpose of carrying on a particular business, will be deemed by implication to continue during the term of such lease (See also *Bates v. McTammany* (1938) 10 Cal. (2d) 697, 76 P. (2d) 513).

The *Zeibak* case above quoted also seems to dispose of the contention of the Appellant that the joint venture or partnership of the parties here could be

dissolved at will. In this connection the Court states on page 13:

> "* * * Plaintiff further contends that, assuming the application of section 2432, Civil Code, to joint ventures, it does not apply here because the venture was one which could have been lawfully dissolved by the 'express will' of a member thereof, under section 2425(b), Civil Code. This section reads as follows: 'Dissolution is caused: * * * (b) By the express will of any partner when no definite term or particular undertaking is specified, * * *' This contention likewise cannot be upheld for the reason that the venture here was not one which could have been lawfully dissolved by the *express will* of a member thereof. Here there was a definite, and 'particular undertaking', voluntarily assumed by each of the partners, and as hereinabove stated, the term of the venture, at least impliedly, was of similar duration as the term of the leases under which the theatres were operated. In the case of *Bates v. McTammany,* 10 Cal. (2d) 697 (76 Pac. (2d) 513), this claim was also made. There the court found that the partnership was formed for the purpose of conducting a radio station 'so long as the license therefor could be obtained from the federal government'. The defendant contended that the partnership was one at will and that he was entitled to a dissolution under certain sections of the Civil Code, including section 2425 (b). The court there said, 'The finding that the partnership was formed for a definite undertaking * * * and so long as the federal license therefor could be procured, is fully supported by the record, and negatives any conclusion which otherwise might be drawn that the partnership was one at will.' * * *"

The case of *Irer v. Gawn* (1929) 99 Cal. App. 17, 277 P. 1053, also seems to dispose of most of the contentions of Appellant in this case. This case clearly holds that so far as the interests of the principals to a joint venture are concerned, it is immaterial whether the agreement be a co-partnership or a joint adventure, the legal principles applicable being the same. In the language of the court, appearing at page 23:

> "* * * but so far as the interests of the principals in this transaction are concerned it is immaterial whether it be deemed to be a co-partnership or a joint adventure for the legal principles which are applicable are the same (14 Cal. Jur. 760; *Butler v. Union Trust Co.,* 178 Cal. 195, 172 P. 601)."

So, also, the case of *Butler v. Union Trust Co.,* cited in the *Irer* case above, contains the following statement at 178 Cal., page 198:

> "* * * Joint adventure, however, is similar to a partnership and being of a similar nature the right to an accounting of profits in accordance with the agreement therefor and the obligations growing out of such agreement between the parties are governed by the same rules of law. * * *" (Cases cited, including *Clafin Co. v. Gross,* 112 Fed. 386.)

The matter is further clearly set forth in 14 Cal. Jur. at page 760 where the similarities and differences between the two types of enterprises are discussed and distinguished. The article concludes as follows:

> "* * * Inasmuch, however, as the two relationships are similar, the rights and allegations of the joint adventurers, as between themselves, are governed by practically the same rules that govern the relation of partners. * * *"

In all of the cases and the text material referring to this matter it is perfectly clear that whether the transaction be called a joint venture or partnership, the court looks to the terms of the agreement between the parties to ascertain their respective rights and liabilities.

V. OTHER ARGUMENTS OF APPELLANT.

Since Appellee takes the position that the rights and obligations of the parties and the dissolution of their relationship is governed by the rules pertaining to partnership, he deems it unnecessary to comment further on various other arguments of the Appellant, particularly those which state that the Appellee was either entitled to no share of the profits or at most a share of the profits up to April 21, 1953, the date Appellant sent notice of termination to Appellee. So, also, with the Appellant's argument that if Appellee was entitled to a share of the profits to April 21, 1953, it should be a reduced share because Appellee contributed a lesser value to the venture than Appellant. As pointed out in the Appellee's comments on Appellant's statement of the case, Appellee actually contributed a full one-half of the value of the assets of the venture at the time of its commencement and, hence, as a mat-

ter of fact, as well as a matter of contract, was entitled to an equal division of the profits.

Nor can Appellee find any merit in Appellant's contention that Appellee was only entitled to profits for a limited period of time. The contract covers the liabilities of the parties, and even if it did not, Appellee is unable to find any case which even remotely holds that a partnership or joint venture once having been commenced can be terminated by the type of notice relied upon here. Certainly, there is no case which permits forfeiture of the Appellee's interest in the assets of the partnership, regardless of whatever his interest would be in the profits. It is significant to note that throughout this entire case Appellant has never referred to the value of the assets of this business, and apparently assumes that the only matter in controversy is the percentage of profits, if any, it should pay to Appellee, presuming that under some unspecified theory of the law the Court should leave Appellant in complete ownership and possession of all of the partnership assets. It is respectfully suggested that no such rule of law is in existence.

To contend that Appellee is only entitled to the return of his original investment with or without a share of the profits amounts to a forfeiture of his partnership interest. The law does not contemplate such a forfeiture, and it has been held that even where a partner has failed to pay his share of the capital, or its debts or expenses, there is no cause for forfeiture of such partnership interest in the partnership property (*Kimball v. Gearhardt* (1859) 12 Cal. 27).

See also *Martin v. Burris* (1922) 57 C.A. 739, 208 P. 174, also holding that to permit the retention by one party of any profits not in accordance with the agreement amounts to a forfeiture of a portion of this party's interest.

Appellee's contentions as to the proper method of computing profits in this action and for distribution of assets and otherwise liquidating the venture are set forth in his brief filed as Cross-Appellant herein and, therefore, in the interest of brevity will not be now repeated.

VI. ARGUMENTS REGARDING COMPANION CASE OF PACIFIC ENTERPRISES, INC. v. THE DAIRY QUEEN.

As pointed out in his comments on Appellant's statement of the case, Appellee believes that the issues in this case are questions of fact which should be left to the discretion of the trial court who was in the best position to judge the credibility of witnesses on conflicting testimony.

VII. COMMENTS ON APPELLANT'S POINTS NUMBER IX (PAGE 70), X (PAGE 73) AND XI (PAGE 74).

These three contentions of the Appellant do not appear to the Appellee to have any substantial merit. This Court has already decided the question of jury trial in Guam, and it appears idle to again review this question, particularly as to a civil action.

With regard to Appellant's motion for change of venue, the denial of which it is urging as a ground for

reversal, this likewise seems to possess little merit. It may be that the stockholders and directors of Appellant corporation live in the State of Washington, but all of the transactions involving this controversy took place in the Territory of Guam. The business was located there, the contract was to be performed there and the matter was within the jurisdiction of the District Court there. Certainly, no showing was made that it would be more convenient to transport all the witnesses from Guam to Seattle to have the trial in that state.

So, also, in the case of Appellant's motion for a continuance. The action was filed on September 20, 1954, and the Interlocutory Judgment filed February 18, 1955. Surely the Appellant had ample notice to have whatever supplemental papers he wished sent to Guam. The president of Appellant corporation was on Guam for weeks before the trial and Appellee, on the hearing of the motion for continuance, questioned the good faith of Appellant in asking for the same. Actually, during the trial (Record, page 215) Mr. Thompson testified that the records referred to in his affidavit for continuance are presumed lost. Nor has Appellant ever contended that the missing reports are now located, and if produced, would materially alter the decision of the Court.

With respect to the somewhat odd theory advanced by Appellant under item XI on page 74, the Appellee has little comment. Obviously, Appellee was represented by a different counsel than Appellant in the action involving the dissolution of the partnership.

Appellee's same counsel brought an action on behalf of Appellee's corporation against the co-partnership for services rendered, and this action was vigorously defended on behalf of Appellant who had all of the assets and was in complete control of the partnership properties, books and records. What would have been gained by separating Appellant and Appellee as Defendants in the companion suit is not pointed out. It may be assumed that the same testimony would have been given by all parties in the separate suits. Furthermore, the liability of the co-partnership to Pacific Enterprises, Inc., was a partnership liability to be borne from the partnership assets. How this could have been accomplished by two separate suits against the co-partners or co-venturers individually is unknown.

VIII. CONCLUSION.

Appellee respectfully submits that the correct analysis of the law and the facts in the case at bar is contained in his Opening Brief as Cross-Appellant.

Dated, Benicia, California,
February 24, 1956.

Respectfully submitted,
JOHN A. BOHN,
WALTER S. FERENZ,
Attorneys for Appellees
Joseph A. Siciliano and Pacific
Enterprises, Inc., a corporation.

No. 14,805

United States Court of Appeals

For the Ninth Circuit

AMERICAN PACIFIC DAIRY PRODUCTS, INC., a Corporation,

Appellant,

vs.

JOSEPH A. SICILIANO,

Appellee.

JOSEPH A. SICILIANO,

Appellant,

vs.

AMERICAN PACIFIC DAIRY PRODUCTS, INC., a Corporation,

Appellee.

BRIEF OF CROSS-APPELLANT JOSEPH A. SICILIANO IN RESPONSE TO REPLY BRIEF OF AMERICAN PACIFIC DAIRY PRODUCTS, INC., CROSS-APPELLEE.

JOHN A. BOHN,
P. O. Box 771, Agana, Guam,
WALTER S. FERENZ,
903 First Street, Benicia, California,
Attorneys for Cross-Appellant and Appellee.

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FURTHER COMMENTS ON STATEMENT OF FACTS.

This constitutes the third statement of this case by the plaintiff, Mr. Joseph A. Siciliano (hereinafter referred to as Appellee) and is an additional attempt to present a clear picture of the facts, and, particularly,

to place them in the perspective that is demanded by the nature of the original transaction in Guam.

As such, the Appellee refers to his Statement of the Facts and his Comment to Appellant's Statement of the Case contained in his opening brief and response brief, respectively.

Before discussing individually the points raised by Appellant in its response brief, Appellee desires to restate, at the risk of belaboring the point, the nature of the transaction.

The giving of testimony in the trial in Guam commenced by Plaintiff taking the stand. His initial testimony established that, as a business man on Guam, he owned and operated a large luxury type restaurant and night club, a bakery, a snack bar, a farm and part interest in a sea-going vessel. These business enterprises were owned and operated primarily by and through a corporation, Pacific Enterprises, Inc., of which Appellee owned all but a few qualifying shares.

At the time Mr. Edward Thompson, president of Appellant corporation, negotiated with Appellee, the Record shows that Appellee employed between 100 to 110 employees, and that his combined operations grossed from $1,500.00 to $2,000.00 per day (Record, pages 137-138).

On page 97 of the Record, the trial court in its Memorandum Opinion, stated in part as follows:

> "* * * Because of his energy and business acumen he (appellee) was recognized as a very successful businessman. * * *"

Mr. Edward Thompson himself testified that Appellee was "one of the ablest men I know." (Record, page 252).

The trial court apparently concluded from the facts and some language in the agreement (see Memorandum Opinion, Record, page 98) that the agreement required the Appellee to act as manager of the Dairy Queen in the same capacity and same manner that Joseph Meggo, employee of Pacific Enterprises, Inc., did act, and that Norman Thompson now acts.

However, Appellee contends that the facts recited hereinabove must necessarily detract from the finding of the trial court and the contention of Appellant. Certainly, from an examination of Appellee's position in Guam and his business activities and ability, Appellee contends that the evidence does not sustain a finding that the parties intended and agreed that Appellee was to act as manager in the sense that the daily reports, inventories, mixing and dispensing of ice cream, ordering of supplies and all other routine matters must personally be attended to by Appellee. The business of this partnership or venture was the mixing and dispensing of ice cream under the simplest of methods. Can it really be said that Appellee, Mr. Joseph Siciliano, was required to personally oversee the venture and was thereby prevented from delegating the managership to others?

On page 2 of Appellant's response brief, in an effort to attack the contention of Appellee that the managership duties were delegated to employees of

Pacific Enterprises, Inc., Appellant has referred to the fact that the salaries of such employees were not allowed as a charge against the partnership in the companion case of *Pacific Enterprises, Inc. v. American Pacific Dairy Products, Inc.* Appellee absolutely concurs in this finding because it completely substantiates the proposition that performance assumed by Appellee was delegated. If, in fact, Joseph Meggo and Enesto O. Diza were employees of Edward Thompson, or Appellant, then the partnership should have paid their salaries and not Pacific Enterprises, Inc., as was the case. As Appellee pointed out in his response brief, the partnership was not held responsible for such salaries, not because there was no evidence to support them, but because of their nature. This point was recognized by the trial court when it said:

> "* * * The Court. They (salaries) were not charged on your (Pacific Enterprises, Inc.) books. Consequently I just have to assume that they were a gratuitous contribution by Mr. Siciliano during this hiatus period when he wasn't sure whether he was coming back or not." (Record, Case No. 14806, page 231)

Appellant, in its response brief (page 2), has cited the Record of Case No. 14806, pages 70-71 for the proposition that there is no evidence to support the salaries claimed by Pacific Enterprise. The fact salaries were paid is not disputed even by Appellant's president. The more accurate statement, from the

Record cited by Appellant above, is that salaries were paid but not by the partnership.

Appellant has placed great stress on the amount of communication between Appellee and his employees during the former's two year absence (Appellant's response brief, page 3). Also, much emphasis is placed on the several findings of the trial court relating to the general conditions at the Dairy Queen store when Appellant assumed managerial control. Appellee has already admitted that any partner has the right to manage as a right of the law of partnerships, and that Appellee has also admitted for the purpose of discussion only, that Appellant might be justified in excluding Appellee's employees from the business. However, Appellee wishes to point out that these facts are not pertinent in a determination of whether a valid delegation of duty was made and has, in reality, no bearing on dissolution of the partnership.

Appellant contends that the reports prepared by Enesto O. Diza, Appellee's bookkeeper, were not accepted by Mr. Edward Thompson (Appellant's response brief, page 3). However, in the Supplemental Findings of Fact, the lower court specifically found that the Appellant did accept the accuracy thereof. Its finding reads in part as follows:

> "* * * 2. The bookkeeper for Pacific Enterprises, Inc., prepared monthly financial statements, cumulative in nature, in accordance with defendant's instructions, and the defendant accepted such statements as being correct. * * *" (Record, page 110)

This finding is supported by the testimony (Record, Case No. 14805, pages 334-349). Appellee has not contended that Mr. Edward Thompson testified to the accuracy of Mr. Diza's monthly reports. Appellee only contends that the same were accepted by Appellant as accurate.

Appellee believes, and the trial court did also, that the testimony indicated that for the period from June 22, 1952 through May 31, 1953, cumulative monthly financial statements were prepared and, those prior to May at least, were mailed to Mr. Edward Thompson in Seattle. These reports were received periodically and the record fails to state that the same were inaccurate or even that Mr. Thompson felt they were inaccurate.

Also, Appellant admits receiving checks and drafts from Appellee totaling over $100,000.00. Taken together, the reports show that the net profit from June 22, 1952 to May 31, 1953 was $31,403.47 (Record, Case No. 14805, page 214). Of course, this figure is derived from the bookkeeping record of Mr. Diza, but Appellant offered no evidence to contradict the financial statement which supplied the profit figure and there is nothing in the record to indicate the figure is not accurate.

Appellant has also questioned the accuracy of Appellee's Statement of the Case in regard to the Appellant's wrongful use of partnership funds in a competing business. That portion of Appellant's response brief which is concerned with this matter is set forth in full as follows:

"* * * Cross-appellant Siciliano states that profits and funds of the partnership business were used by the defendant for the benefit of a competing corporation known as Guam Frozen Products, Inc. (Pl. Br., page 7-8). It is true that funds of American Pacific Dairy Products, Inc., were used in establishing Guam Frozen Products, Inc., but this was done after the dissolution and termination of the purported partnership and *the Record does not reflect that any of the funds of Siciliano were used for this purpose (R. 14805, page 239-242).* * * *" (Emphasis supplied)

In answer to the above statement, Appellee sets forth the following portions of the Record in Case No. 14805 containing testimony of Appellant's president, Mr. Edward Thompson:

"* * * Q. What line of business is American Pacific Dairy in?

A. No other line of business. If there was miscellaneous receipts they would go in there but I don't know of any miscellaneous receipts.

Q. So your testimony is that all the money in the account of American Pacific Dairy Products established in the Bank of America, Agana, Guam, came from Dairy Queen, is that correct?

A. I would say so, yes.

Q. Well, is that wrong?

A. No; it is right.

Q. Now, from that account there was spent $26,740.63 for the benefit of a corporation known as Guam Frozen Products, Inc.?

A. That is right, sir, yes. * * *" (Record, Case No. 14805, page 239)

Mr. Edward Thompson's testimony continues as follows:

"* * * The Court. Have either Mrs. Litch or Mr. Hevessy participated in the management of the second store?

A. No, sir.

The Court. Then why do you contend that Mr. Siciliano isn't entitled to participation on the same basis in the second store? You have denied Mr. Siciliano the right to participate in the profits?

A. That is right; yes, sir.

The Court. You just said you have Mrs. Litch and Mr. Hevessy in the second store?

A. We organized the corporation and they bought stock in it.

The Court. You have the use of their money?

A. Yes.

The Court. *And you had the use of Mr. Siciliano's money?*

A. *Yes.* * * *" (Record, Case No. 14805, page 245) (Emphasis supplied)

Appellant on appeal now feels that it did not use Appellee's money for this diversionary project. However, his conclusion is an erroneous conclusion of law and additionally is contradicted by the testimony of its own president.

ARGUMENT.

I.

THE LOWER COURT ERRED IN HOLDING AND DECIDING APPELLEE, MR. JOSEPH A. SICILIANO, BREACHED THE PARTNERSHIP AGREEMENT.

As stated in his opening brief (pages 11-19), reference to which is hereby made, Appellee believes and contends, on the basis of the facts as produced at the trial, that, as a matter of law, he did not breach the partnership agreement. For the purposes of this brief, Appellee will restate his position for the purpose of attempting to clarify the issue.

The lower court erred in interpreting the partnership agreement as binding the appellee to assume the responsibilities of manager.

Although Appellee recognizes the Federal Rules of Procedure apply in this case, the action itself is not a federal case except for the fact that it arises in an unincorporated territory of the United States. Consequently, because of uncertainty, Appellee has used California authority on matters involving scope of review on appeal even though the proper authority might be federal cases. However, Appellee believes that the rules of law used are of sufficiently general nature to be persuasive, even though perhaps not binding, authority on this Court.

Appellee contends that the lower court construed the contract as placing a contractual duty on Appellee to manage the Dairy Queen, and to arrive at this conclusion apparently resorted to extrinsic evidence (Record, pages 98-99). Appellee believes that because

the facts relating to the execution of the contract such as, what the Appellant sought, what the Appellee wanted, and, particularly, what the Appellee had to offer in the way of organization, capital, and local connections, are not in substantial dispute, the construction of this contract is a matter of law and hence subject to review by this Court (*Leis v. City and County of San Francisco* (1931) 213 Cal. 256, 2 P. (2d) 26).

Appellee contends the language of the written instrument was clear and unequivocal that Appellee would be paid if he assumed managerial responsibility, and that, therefore, this Court should re-examine the agreement and review the decision of the lower court (*Brant v. California Dairies* (1935) 4 Cal. (2d) 128, 48 P. (2d) 13).

The fact that Appellee left Guam on July 1, 1952 and did not return for two years is an undisputed fact. Therefore, Appellee contends, assuming it is found that Appellee was obligated to assume the responsibilities of managership, that this Court should review whether or not by his prolonged absence he breached this duty where,

(1) the contractual duty of being manager (assuming it exists), does not require that Appellee be physically present on Guam at all times; and

(2) the contract does not prevent delegation of duties thereunder; and

(3) Appellant accepted the delegated performance with knowledge thereof until April, 1953; and

(4) there is no evidence in the record to dispute the above facts.

In its Memorandum Opinion (Record, page 100), the court found as follows:

> "* * * The Defendant (Appellant here) took full advantage of the services being performed by Pacific Enterprises, Inc., and accepted the benefits of a successful operation; it has not accounted for any profits during such period. * * *"

Appellant, on page 10 of its opening brief, has objected to the theory of this case as contended by Appellee on the grounds that the performance delegated varied materially from that which might be the case had Appellee not left Guam and that there was no assent to the delegation. However, there is no evidence in the record that the expected performance of Appellee would have been different from that which was actually received or expected (Memorandum Opinion, Record, page 108). In fact, the operation of this business under the management of Appellee's employees was extremely profitable whereas, since April, 1953, the date Appellant took over, the profits have declined considerably (Record, pages 383-384). In addition, the evidence undisputably shows that Appellant did consent to the delegated performance by acceptance of the benefits thereof. Appellee, therefore, contends the rules of contract law as stated by the Restatement of the Law of Contracts, Sections 160(3) and 162(3) are applicable to this case.

In this regard, on page 10 of Appellant's response brief, it states in part as follows:

> "* * * The Lower Court found as a matter of fact that the employees of Pacific Enterprises, Inc., were not properly operating the business and that delegation to them was certainly not proper * * *"

The lower court did find as a matter of fact certain conditions which it held justified the Appellant in taking over control of the business (Record, pages 101-102). However, Appellee is unaware of any finding by the trial court to the effect that delegation was improper and the undisputed evidence is to the contrary.

In this connection Appellee wished to emphasize it does not argue or contend that Appellant had no right to participate in the management of the partnership business. Throughout its brief, Appellee believes the Appellant has confused this right to take over management with its asserted right to summarily and arbitrarily dissolve, terminate, liquidate and forfeit a partner's interest on the grounds of an alleged breach of agreement.

II.

APPELLEE AS PARTNER OF THIS VENTURE OR PARTNERSHIP HAS THE ACTUAL AND IMPLIED AUTHORITY TO DELEGATE MANAGEMENT DUTIES TO SUB-AGENTS.

In his opening brief, Appellee has argued that a partnership business which only comprises the mixing of ice cream and its sale and distribution is not such a financially complex venture that the manager there-

of should be precluded from the right to delegate such duties to sub-agents, particularly in the absence of an express limitation thereof. For his authority, Appellee cited several cases which stood for general principles of partnership law as affected by the law of agency (Plaintiff's opening brief, pages 11-19). Applicable code sections were also cited. Appellee believes that in such cases, the presence of such authority must be decided upon its own merits and that, therefore, specific cases in point are not necessarily valuable as authority.

The facts alone are important to this decision. When one considers the amount of delegation of duties that is a part of our economic structure, it would certainly seem safe to state that restrictions on delegations are the exception.

In this case, can it be said with any degree of seriousness that Appellee should not be able to fully delegate the responsibilities of opening and closing this ice cream store, checking the receipts, posting entries, taking inventory, mixing batches, dispensing cones and the many other menial tasks connected with its daily operation? Appellee was by ability and position far above the occupation of manager of an ice cream parlor and this factor was admittedly known by Appellant's president at all times during their negotiations.

The Appellee contends the facts show that Appellant bargained primarily for his capital and labor force. Under the general rule, an agent, not otherwise restricted, has the authority to delegate any clerical,

mechanical or ministerial acts (Guam Civil Code, Section 2349). Appellee contends he delegated only the mechanical acts relating to the daily operation of the store and no discretionary acts were in fact delegated.

Appellee is unaware of any special rule of partnership which alters the above rule. Although only one case (*Bank of North America v. Embury, N. Y.* (1861), 33 Barb. 323, 21 How. Pr. 14) has been found that holds that a resident partner that is obliged to be absent for a time may employ a general agent (Plaintiff's opening brief, page 17), the matter as presented here would seem to be resolved on the type of delegation that was actually made.

III.

A PARTNERSHIP OR JOINT VENTURE IS NOT TERMINATED OR LIQUIDATED BY THE SUMMARY AND ARBITRARY INTENT OF ONE PARTNER TO TENDER TO THE OTHER HIS ORIGINAL INVESTMENT, PARTICULARLY WHERE SUBSTANTIAL PROFITS REMAIN UNDISTRIBUTED.

An important issue is presented by argument of both parties heretofore. Briefly, it may be stated as follows: Can a partner who believes his co-partner has breached the partnership agreement, arbitrarily and summarily exclude such co-partner from all profits and all assets by serving a notice of termination not in accordance with the terms of the agreement, and, subsequently to such notice, liquidate the relationship under the terms and conditions of its own decision and choosing?

Appellant contends it can, and that, therefore, its action in using partnership funds to establish a competing business was not wrongful because this investment was made after Appellant excluded Appellee from the partnership in April, 1953. The pertinent portions of Appellant's arguments are as follows:

> "* * * The Court found that the defendant abandoned its efforts to get the plaintiff to return and took exclusive control of the partnership business on July 1, 1953 (R. 14805, p. 102). At this point liquidation has occurred. The evidence is undisputed that the defendant American Pacific Dairy Products, Inc. did not invest in Guam Frozen Products, Inc. until November, 1953, which was *five months after the liquidation* of the partnership business (R. 14805, p. 239). These findings establish that there was no partnership to be dissolved in November, 1953 when defendant invested in Guam Frozen Products. * * *" (Appellant's response brief, page 12)

However, even though it may be assumed that for the purpose of discussion only that Appellant was justified in assuming sole control of the assets on July 1, 1953 because of some act of Appellee that amounted to a breach of the partnership agreement, Appellee contends that liquidation in any case should proceed in orderly fashion. The remaining partner after dissolution occupies the position of a mere trustee, and his right to the possession of the partnership assets is merely for the purpose of winding up the partnership affairs (*Ruppe v. Utter* (1925) 76 Cal. App. 19, 243 P. 715). Certainly, a trustee should not

invest such funds for its own use and benefit, as did Appellant in this case.

It appears to Appellee that throughout the arguments of Appellant, it has misconstrued the nature of the liquidation of a partnership. It maintains liquidation occurs when, for any reason, one partner comes into sole and exclusive possession of partnership assets (Appellant's second brief, page 12). Appellant contends however, that liquidation is the process that occurs after dissolution and before termination; wherein pre-dissolution matters are disposed of, debt collected, accounting of relative interests made, and each partner's interest determined (Guam Civil Code, Section 2424; *Cotten v. Perishable Air Conditioners* (1941) 18 Cal. (2d) 575, 116 P. (2d) 603; *Freese v. Smith* (1952) 114 Cal. App. (2d) 283, 250 P. (2d) 261).

Therefore, assuming a legal dissolution occurred July 1, 1953, as found by the court (which Appellee disputes), there has been no liquidation of the partnership affairs as of this date.

As pointed out in Appellee's response brief, the offer of termination was improper and created no duty to answer before Appellee had an opportunity to return to Guam and be apprised of the local state of affairs. In addition, those cases cited by Appellant on page 46 of its opening brief relating to the duty of a partner to reply to an offer of termination would hardly apply to this situation. First, in those cases (*Wood v. Gunther* (1949) 89 Cal. App. (2d) 718, 201 P. (2d) 874; *Meherin v. Meherin* (1949) 93 Cal. App.

(2d) 459, 209 P. (2d) 36; *Pacific Atlantic Wine, Inc. v. Duccini* (1952) 111 Cal. App. (2d) 957, 245 P. (2d) 622), the court is concerned with bona fide cases of offers which, in the *Meherin* case contained audit reports and, in the *Wood* case, contained offers to submit the matter to evaluation. In this case, Appellant did not send an *offer to terminate,* but sent a *notice of termination;* an arbitrary action in contravention of the agreement between the parties. That Appellant sent a notice of termination and not an offer to terminate is admitted in its pleadings (Record, page 48). The Appellant claims that it tendered Appellee its original $15,000.00 investment. However, there is no evidence in the record that even infers that this tender was ever made (see Record, page 315).

In regards to the applicability of *Zeibak v. Nasser* (1938) 12 Cal. (2d) 1, 82 P. (2d) 375, to this case as stated by Appellant in its response brief on pages 13-14, Appellee is also willing to submit this case on the above authority.

Insofar as applicable here, Appellee contends that the *Zeibak* case, supra, held as follows:

(1) That the date of the decree of dissolution in an action wherein a partner is charged with wrongful conduct is the proper date of dissolution and the acts constituting such wrongful conduct do not *ipso facto* dissolve the partnership.

(2) A partner, in an accounting, is entitled to his *pro rata* share of the physical assets as of the date of dissolution. (In this case, Appellee was awarded only his original investment plus interest but Appellant's

president admitted that Appellee's interest was twice that amount, or approximately $30,000.00 (Record, pages 270-271).

(3) That the wrongful partner is not entitled to share in the good will.

Appellee contends that the *Zeibak* case does not hold that a partner who causes a dissolution by wrongful conduct may be excluded in the sense that his entire investment can henceforth be treated merely as a friendly loan.

Appellant contends it had a going business before Appellee became a partner. However, the record does not sustain this contention and the facts are otherwise. Appellee's employees and Appellee worked several days in the Dairy Queen before it commenced operations. While it is true that Appellant excluded Appellee, its only apparent justification was the fact of his absence from Guam, for it is admitted throughout the trial that Appellee earned substantial profits for the partnership. These profits were, in fact, considerably greater than what was earned under the present management by Appellant. Certainly, the *Zeibak* case is not authority for the justification of the exclusion of Appellee in this case as Appellant has contended.

IV.

WHERE ONE PARTNER BELIEVES ANOTHER HAS BREACHED THE PARTNERSHIP AGREEMENT, AND THAT SUCH BREACH PREJUDICIALLY AFFECTS THE WELFARE OF THE PARTNERSHIP BUSINESS, SUCH PARTNER SHOULD APPLY TO A COURT OF COMPETENT JURISDICTION FOR A DECREE DISSOLVING THE RELATIONSHIP.

Appellee believes that the law of partnerships requires, in those cases where the parties disagree on whether or not a given set of facts constitutes a breach of contract or a detriment to a going concern, that the question be resolved by a court of competent jurisdiction. Also, in those cases where the dissolution is accepted by all the parties, an accounting must be had if the parties cannot reach an agreement on their respective rights to the assets. As a practical matter, most cases Appellee has examined usually involve both questions of dissolution and accounting.

Sections 2425 and 2426 of the Guam Civil Code are interpreted by Appellee as requiring application to a court in all cases where it is alleged a breach of contract is wilfully and persistently committed, or it is alleged a partner is guilty of prejudicial conduct (Section 2426, (c) and (d)).

By virtue of the terms of the Articles of Co-Partnership of this venture, and by virtue of the lease of the real property involved, this partnership was one for a fixed term. To dissolve it before the expiration of its term is, as a matter of law, a violation of the agreement (*Bates v. McTammany* (1938) 10 Cal. (2d) 697, 76 P. (2d) 513). Hence, if Appellant's resolution constituted a dissolution of this venture, it was wrongful and its continual possession of the assets was

wrongful. On this basis, Appellee is entitled to his *pro rata* (50%) share of profits earned by the use of all the assets (*Mosley v. Mosley* (1952 C.A. 9th), 196 F. (2d) 663).

The Uniform Partnership Act is not clear on what the winding up of a partnership entails. It certainly is not, as Appellant contends, the exclusion of a partner from the business. Traditionally, it follows dissolution and is a marshalling of assets, determination of net worth, by appraisal if necessary, and the distribution in accordance with the agreement and/or the Uniform Partnership Act (see *Zeibak v. Nasser* (1938) 12 Cal. (2d) 1, 82 P. (2d) 375).

V.

AN ACCOUNTING FOR ALL PROFITS EARNED BY THE PARTNERSHIP BUSINESS IS JUSTIFIED UNDER THE CONDITIONS WHEREBY APPELLEE WAS EXCLUDED FROM THE AFFAIRS OF THE PARTNERSHIP.

The Appellee has contended that he is entitled to his *pro rata* (50%) share of all profits and that an accounting should be directed to that end. This accounting should be ordered on either of two grounds:

(1) the date of dissolution should be determined as of the date of judicial decree, or

(2) the Appellee is entitled to his *pro rata* share of profits because of the Appellant's wrongful use thereof after dissolution on July 1, 1953. In other words, the date of dissolution in this case is unimportant except that the assets are valued as of that date for

purposes of the accounting and the determination of the Appellee's interest therein.

Appellee's arguments are heretofore set forth in his opening brief and are not repeated here (opening brief, pages 23-30). However, Appellee believes several statements in Appellant's response (second) brief should be answered.

Appellee filed his action in September, 1954. He was excluded on or about July 1, 1953. Suffice it to say that the applicable statutes of limitation and general rules of laches answer any arguments to delay on the part of Appellee in formally objecting to his exclusion. Such delay does not constitute acquiescence. As stated hereinbefore, there was no tender to Appellee for his interest, either factually or legally, and the Appellant's statements to the contrary are completely erroneous and unsupported by the record.

As regards the diversion and use of funds belonging to Appellee, the fact thereof was admitted by Mr. Edward Thompson, Appellant's president (Record, Case No. 14805, page 245).

VI.

THE APPOINTMENT OF A RECEIVER IS WITHIN THE DISCRETION OF THE TRIAL COURT, AND THERE IS SUFFICIENT EVIDENCE IN THE RECORD OF APPELLANT'S BAD FAITH TO JUSTIFY A REVIEW BY THIS COURT WHETHER OR NOT THERE WAS AN ABUSE OF SUCH DISCRETION.

Appellee does not contest the rule of law applicable to the appointment of a receiver in matters of this nature. However, the fact that Appellee's funds were

diverted and used by Appellant in another business wherein stock thereto was issued solely in the name of Appellant, where, immediately after Appellee's exclusion, profits dropped drastically, indicating diversion, mismanagement, or both, and where, since April, 1953, the Appellant has attempted to deny to Appellee any of the profits earned by the business during his vicarious management, all tend to show such a state of affairs that is it likely that Appellee will be irreparably harmed if the business is allowed to be continued in Appellant's hand?

VII.

AS A MATTER OF LAW, THE WRONGFUL PARTY TO A DISSOLUTION IS NOT ENTITLED TO THE GOOD WILL.

Appellee and Appellant concur in their analysis of the applicable law in this issue. The only disagreement is its application to this case.

Appellee contends that the lower court erred in holding that Appellee breached the agreement by leaving Guam. (The court also held that no damages resulted from Appellee's absence, Record, page 103). It is important to note, however, that the court also found that Appellant excluded Appellee from all of the affairs of the partnership (and, upon no evidence thereto, held erroneously that he acquiesced to such exclusion), that it used the profits and capital investment of Appellee for its own use and enjoyment, and that it diverted such funds into a competing business (Record, Case No. 14805, pages 108-113).

It would seem without a doubt that Appellee is entitled to the good will as innocent, or more innocent, party to the dissolution. Assuming the decision of the lower court relating to the finding that Appellee caused the breach is upheld, Appellee contends that this Court is still confronted with wrongful acts of Appellant which should effect his right to the good will.

CONCLUSION.

Appellee, and Cross-Appellant, Mr. Joseph A. Siciliano, is entitled to more than the return of his original investment with interest plus profits earned to July 1, 1953 because the Appellant and Cross-Appellee, American Pacific Dairy Products, Inc., withheld profits, wrongfully excluded Appellee, and used his capital and profits to further its own interests to Appellee's detriment. Appellee believes he is entitled to at least a one-half interest in all assets, including the good will, or its value, as of July 1, 1953, one-half of all profits earned to February 18, 1955, and an accounting so that the rights of the parties may be finally determined.

Dated, Benicia, California,
March 9, 1956.

Respectfully submitted,
JOHN A. BOHN,
WALTER S. FERENZ,
Attorneys for Cross-Appellant and Appellee.

No. 14,805

United States Court of Appeals

For the Ninth Circuit

AMERICAN PACIFIC DAIRY PRODUCTS, INC., a corporation, *Appellant,* vs. JOSEPH A. SICILIANO, *Appellee.*	
JOSEPH A. SICILIANO, *Appellant,* vs. AMERICAN PACIFIC DAIRY PRODUCTS, INC., a corporation, *Appellee.*	

PETITION OF APPELLEE JOSEPH A. SICILIANO FOR A REHEARING.

JOHN A. BOHN,
P. O. Box 771, Agana, Guam,
WALTER S. FERENZ,
903 First Street, Benicia, California,
Attorneys for Appellee and Petitioner Joseph A. Siciliano.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

No. 14,805

United States Court of Appeals
For the Ninth Circuit

AMERICAN PACIFIC DAIRY PRODUCTS, INC., a corporation,
Appellant,
vs.
JOSEPH A. SICILIANO,
Appellee.

JOSEPH A. SICILIANO,
Appellant,
vs.
AMERICAN PACIFIC DAIRY PRODUCTS, INC., a corporation,
Appellee.

PETITION OF APPELLEE JOSEPH A. SICILIANO FOR A REHEARING.

To the Honorable William Denman, Chief Judge, and to the Honorable Associate Judges of the United States Court of Appeals for the Ninth Circuit:

The petitioner respectfully requests a rehearing in the above-entitled cause and that the decision be modified as hereinafter suggested for the reasons and upon the grounds following, to-wit:

1. That this Honorable Court, as part of its opinion heretofore issued on the 20th day of June, 1956, did find as follows:

"Siciliano argues that he is entitled to a share of the profits earned by the ice cream business on Guam from July 1, 1953, the date of dissolution, until Products Co. settles accounts rather than merely the interest the district court awarded for the use of his capital and profits. Section 2436 of the Guam Civil Code provides:

> 'When any partner retires . . . and the business is continued under . . . the conditions set forth in . . . Section 2432 (b) without any settlement of accounts as between him . . . and the person . . . continuing the business, unless otherwise agreed, he . . . as against such persons . . . may have the value of his interest at the date of dissolution ascertained, and shall receive as an ordinary creditor an amount equal to the value of his interest in the dissolved partnership with interest, or, at his option . . . in lieu of interest, the profits attributable to the use of his right in the property of the dissolved partnership . . .'

This Court has previously construed this section of the Uniform Partnership Act. In Moseley v. Moseley, 196 F. 2d 663, 666-667 (Cir. 9, 1952), we held that

> 'The right of election which appellant has . . . (under this section of the Uniform Partnership Act) . . . is one which he should be permitted to exercise after an accounting shall have been taken of the earnings subsequent to dissolution. Otherwise, the right of election would be an illusory one.'

The district court ordered no such accounting in this case, and no determination was made as to

'the rights attributable to the use of . . . (Siciliano's) . . . right in the property of the dissolved partnership' . . .

The district court erred in not ordering an accounting of the profits earned by the ice cream business on Guam from July 1953 to the date of its judgment."

2. That petitioner Joseph A. Siciliano, respectfully contends that the judgment of this court should be modified to provide that there be an accounting of the profits earned by the ice cream business on Guam to the date American Pacific Dairy Products, Inc., settles accounts with petitioner, rather than merely to the date of the judgment in the court below, for the reason that the American Pacific Dairy Products, Inc., has continued to use the partnership property through the trial and through this appeal and will still continue to use the same during such further proceedings as may be required in the court below.

3. That a miscarriage of justice will occur if the judgment of this court is not so modified since Section 2432 (b) of the Guam Civil Code, as quoted by the Court and as construed by the cases, requires that there be an accounting of profits until the final accounts have been settled between the parties, because until such settlement and payment therefor has been made, profits earned by the business are attributable in part to the property of the withdrawing partner in the partnership business, and any other construction of the statute would place a premium on delay in the final settlement of accounts and winding up of

the partnership business to the advantage of the remaining partner and to the detriment of the withdrawing partner.

In construing a similar statute, the California court in *Vangel v. Vangel* (cited by this court in its opinion) held as follows:

> ". . . (16) Furthermore, it appearing from the briefs and from the oral argument that the status quo with respect to the partnership operations has remained unaltered during the pendency of this appeal, defendant is entitled to his proportionate share of any profits which have accrued from the employment of his property in the business of the partnership while awaiting the final outcome of this appeal. (Clark v. Jones, 50 Cal. 425.)"

The case of *Moseley v. Moseley* decided by this court and cited in its opinion in the case at bar appears also to sustain petitioner's contention herein.

Wherefore, petitioner respectfully submits that a rehearing should be had upon the issues presented by this petition and that the judgment be modified accordingly.

Dated, Agana, Guam,
July 17, 1956.

JOHN A. BOHN,
WALTER S. FERENZ,
Attorneys for Appellee
and Petitioner
Joseph A. Siciliano.

CERTIFICATE

The undersigned, counsel for the said Appellee in the above and foregoing cause, certifies as follows:

(1) That in his judgment, the above and foregoing petition is well founded; and

(2) That it is not interposed for delay or harassment.

Witness my signature on this 17th day of July, 1956.

JOHN A. BOHN.

No. 14821

United States Court of Appeals

for the Ninth Circuit

KAL W. LINES,

Appellant,

vs.

FALSTAFF BREWING CO., et al.,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Northern District of California, Southern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—12-16-55

No. 14821

United States
Court of Appeals
for the Ninth Circuit

KAL W. LINES,

Appellant,

vs.

FALSTAFF BREWING CO., et al.,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Northern District of California, Southern Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

MAX H. MARGOLIS, ESQ.,
155 Montgomery St.,
San Francisco, California,

Attorney for Appellant.

SHAPRO & ROTHSCHILD,
155 Montgomery St.,
San Francisco, California,

Attorneys for Appellees.

In the Southern Division of the United States District Court for the Northern District of California

In Bankruptcy No. 42878

In the Matter of:

ALFONSO PAUL SANFILIPPO,

Bankrupt.

DEBTOR'S PETITION

To the Honorable Judge of the United States District Court for the Northern District of California.

The Petition of Alfonso Paul Sanfilippo, residing at No. 1320 Lombard Street, in San Francisco, State of California, by occupation a Distiller's Representative and employed by Seagrams Distillers, who states that he has not been known by any other name or trade name, for the past six years, other than Alfonso Paul Sanfilippo, individually and doing business as "Stag Liquors," Respectfully Represents:

1. Your petitioner has had his principal place of business [or has resided, or has had his domicile] at San Francisco, California, within the above judicial district, for a longer portion of the six months immediately preceding the filing of this petition than in any other judicial district.

2. Your petitioner owes debts and is willing to surrender all his property for the benefit of his

creditors, except such as is exempt by law, and desires to obtain the benefit of the Act of Congress relating to bankruptcy.

3. The schedule hereto annexed, marked Schedule A, and verified by your petitioner's oath, contains a full and true statement of all his debts, and, so far as it is possible to ascertain, the names and places of residence of his creditors, and such further statement concerning said debts as are required by the provisions of said Act.

4. The schedule hereto annexed, marked Schedule B, and verified by your petitioner's oath, contains an accurate inventory of all his property, real and personal, and such further statements concerning said property as are required by the provisions of said Act.

Wherefore Your Petitioner Prays, That he may be adjudged by the court to be a bankrupt within the purview of said Act.

/s/ ALFONSO PAUL SANFILIPPO,
Petitioner.

HENRY GROSS and
FRANCIS P. WALSH,

By /s/ HENRY GROSS,
Attorneys for Petitioner.

United States of America,
State of California,
City and County of San Francisco—ss.

I, Alfonso Paul Sanfilippo, the petitioner named in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information, and belief.

/s/ ALFONSO PAUL SANFILIPPO,
Petitioner.

Subscribed and sworn to before me this 15th day of April, 1954.

[Seal] /s/ ADA V. PENNINGTON,
Notary Public in and for the City and County of San Francisco, State of California.

[Title of District Court and Cause.]

VERIFIED LIST OF CREDITORS

Now comes Alfonso Paul Sanfilippo, the above-named bankrupt, and files herewith his verified list of creditors pursuant to the provisions of Section 7a(8) of the Act of Congress relating to Bankruptcy.

McKesson & Robbins, Inc., P.O. Box 836, Main P.O., San Francisco, Calif.

Falstaff Brewing Corporation, Box 468 Main P.O., San Francisco, Calif.

A. K. Thanos Company, 480 Second St., San Francisco, Calif.

Rathjen Bros., Inc., 135 Berry St., San Francisco, Calif.

Max Sobel Wholesale Liquors, 240 Second St., San Francisco, Calif.

Alexandria Distributing Company, 180 Townsend St., San Francisco, Calif.

Haas Brothers, Third & Channel Sts., San Francisco, Calif.

San Francisco Brewing Corporation, 490 Tenth St., San Francisco, Calif.

Juillard, Inc., 840 Tennessee St., San Francisco, Calif.

Ralph Montali, Inc., 548 Third St., San Francisco, Calif.

Acme Breweries, 762 Fulton St., San Francisco, Calif.

J. C. Millett Co., 118 Sacramento St., San Francisco, Calif.

Vick's Distributing Co., 2341 San Pablo, Oakland, Calif.

Goebel Brewing Co. of California, 533 Kirkham, Oakland, Calif.

Gallo Sales Co., 1001 Brannan St., San Francisco, Calif.

California Wine Association, 900 Minnesota, San Francisco, Calif.

Atlas Paper Co., 740 Folsom St., San Francisco, Calif.

Petri Distributing Co., 655-4th St., San Francisco, Calif.

Melvin Sosnick Co., 801 McAllister St., San Francisco, Calif.

Eagle Vineyard Products Co., 1020 Folsom St., San Francisco, Calif.

Monteverde & Parodi, 100 Broadway, San Francisco, Calif.

Anheuser-Busch, Inc., 1650 Third St., San Francisco, Calif.

Twin Peaks Distributing Co., 1050-25th St., San Francisco, Calif.

Pabst Sales Co., 475 Main St., San Francisco, Calif.

Glaser Bros., 422 Second St., San Francisco, Calif.

Alpha Distributing Co., 480 Second St., San Francisco, Calif.

Harry F. Rathjen Co., 2607 Cypress St., Oakland, Calif.

Golden Brand Bottling Co., 275 Barneveld Ave., San Francisco, Calif.

N. Cervelli & Co., 3319 Fillmore St., San Francisco, Calif.

Baruh Liquors, Inc., 256 N. First St., San Jose, Calif.

Pacific Gas & Electric Co., 245 Market St., San Francisco, Calif.

American Burglar Alarm, 165 Jessie St., San Francisco, Calif.

Carlo Arbasetti, 1194 Hollister Ave., San Francisco, Calif.

Brown & Bigelow, St. Paul, Minnesota.

Firemen's Ins. Co. of Newark, N. J., 220 Bush St., San Francisco, Calif.

Golden Bear Wine Co., 1077 McAllister St., San Francisco, Calif.

Felix Lauricella, Attorney at Law, 68 Post St., San Francisco, Calif.

Edwin J. Marino, 1600 McKinnon Ave., San Francisco, Calif.

Pacific Telephone & Telegraph Co., 444 Bush St., San Francisco, Calif.

Pacific Coast Brands, 2700-18th St., San Francisco, Calif.

Albert Peters Co., 1544 Pine St., San Francisco, Calif.

Sunset Scavenger Co., Ft. of Tunnel Ave. & Beatty Rd., San Francisco, Calif.

San Francisco Water Department, 425 Mason St., San Francisco, Calif.

Providenza & Venerando San Filippo, 2320 Filbert St., San Francisco, Calif.

Anglo California National Bank, 35 Cambon Dr., San Francisco, Calif.

American Trust Company, 1 Grant Ave., San Francisco, Calif.

Robert S. Atkins, 150 Sutter St., San Francisco, Calif.

Safe Realty Co., 2344 Judah St., San Francisco, Calif.

Macy's, Stockton at O'Farrell, San Francisco, Calif.

Dr. Gertrude Flint Jones, 490 Post St., San Francisco, Calif.

Dr. Oliver Bailey, 490 Post St., San Francisco, Calif.

Director of Internal Revenue, 100 McAllister St., San Francisco, California.

Duly verified.

[Endorsed]: Filed April 16, 1954.

[Title of District Court and Cause.]

ORDER OF ADJUDICATION AND REFERENCE, ETC.

At San Francisco, in said District, on the 19th day of April, 1954.

The Petition of Alfonso Paul Sanfilippo, individually and doing business as Stagg Liquors, filed on the 16th day of April, 1954, that he be adjudged a bankrupt under the Act of Congress relating to Bankruptcy, having been heard and duly considered, and no opposition being made thereto,

It Is Adjudged that the said Alfonso Paul Sanfilippo, etc., is a bankrupt under the Act of Congress relating to Bankruptcy.

It Is Ordered that the above-entitled proceeding be, and it is hereby referred to Burton J. Wyman, one of the Referees in Bankruptcy of this Court who will be in charge thereof, and to Bernard J. Abrott, Referee in Bankruptcy of this Court, in the event Burton J. Wyman shall be unable to act to take such further proceedings therein as are re-

quired and permitted by said Act, and that the said Alfonso Paul Sanfilippo shall henceforth attend before the said Referee and submit to such orders as may be made by him or by a Judge of this Court relating to said bankruptcy.

It Is Further Ordered that all notices required to be published in the above-entitled matter, and all orders which the Court may direct to be published, be inserted in "The Recorder," a newspaper published in the County of San Francisco, State of California, within the territorial district of this Court, and in the County within which said bankrupt resides.

Dated April 19, 1954.

/s/ GEORGE B. HARRIS,
District Judge.

[Endorsed]: Filed April 19, 1954.

[Title of District Court and Cause.]

STATEMENT OF AFFAIRS AND SCHEDULES A AND B

(Note.—Each question should be answered or the failure to answer explained. If the answer is "none," this should be stated. If additional space is needed for the answer to any question, a separate sheet properly identified and made a part hereof, should be used and attached.

If the bankrupt or debtor is a partnership or a corporation, the questions shall be deemed to be addressed to, and shall be answered on behalf of the partnership or corporation; and the statement shall be verified by a member of the partnership or by a duly authorized officer of the corporation.

The term, "original petition," as used in the following questions, shall mean the petition filed under section 3b or 4a of chapter III, section 322 of chapter XI, section 422 of chapter XII, of section 622 of chapter XIII.)

This statement of affairs is to be filed with the Court in triplicate in every case. With the petition in proceedings under Chapters XI, XII, XIII and five days prior to the first meeting of creditors in all other cases (Sec. 7, Laws of 1938).

Proceedings shall be entitled "In Bankruptcy," In Proceedings for—a Composition or Extension,"—the Reorganization of a Railroad,"—a Composition by a Public Debtor,"—the Reorganization of a Corporation,"—an Arrangement,"—A Real Property Arrangement," or—a Wage Earner Plan," as the case may be. Rule 5 Paragraph 4.

In proceedings under chapter VIII, X, XI, XII, or XIII, of the Act, unless and until the debtor is adjudicated a bankrupt he shall be referred to as a "debtor." In proceedings under chapter IX, the debtor shall be referred to as the "petitioner." Rule 5, paragraph 5.

1. Nature, Location and Name of Business.

a. What business are you engaged in?

Off-sale retail liquor store. Closed December 17, 1953.

b. Where, and under what name, do you carry on such business?

6273 Third Street, San Francisco, Calif. Under name of Stag Liquors.

c. When did you commence such business?

July 1, 1951.

d. Where else, and under what other names, have you carried on business within the six years immediately preceding the filing of the original petition herein?

No other business.

2. Books and Records.

a. By whom, or under whose supervision, have your books of account and records been kept during the two years immediately preceding the filing of the original petition herein?

Joseph Greenberg, Hearst Bldg., San Francisco; February, 1952, to March, 1953; bankrupt kept his own books from July 1, 1951, to February, 1952, and from March, 1953, to December 17, 1953.

b. By whom have your books of account and records been audited during the two years immediately preceding the filing of the original petition herein?

No formal audits were ever made.

c. In whose possession are your books of account and records?

Board of Trade, 444 Market St., San Francisco.

3. Financial Statements.

a. Have you issued any financial statements within the two years immediately preceding the filing of the original petition herein?

Not to the best of my knowledge and recollection.

4. Inventories.

a. When was the last inventory of your property taken?

December 18, 1953.

b. By whom, or under whose supervision, was this inventory taken?

By the Board of Trade of San Francisco.

c. What was the amount, in dollars, of the inventory? (State whether the inventory was taken at cost, market, or otherwise.)

$3,180.00 at cost to bankrupt.

d. When was the next prior inventory of your property taken?

July 1, 1953.

e. By whom, or under whose supervision, was this inventory taken?

By the bankrupt.

f. What was the amount, in dollars, of the inventory?

g. In whose possession are the records of the two inventories above referred to?

Board of Trade of San Francisco.

5. Income Other Than From Operation of Business.

a. What amount of income other than from the operation of your business, have you received during each of the two years immediately preceding the filing of the original petition herein?

Employed by Seagram Distillers Corporation since March 1, 1953, at a basic salary of $400.00 per month.

Disability pension of $13.80 per month arising out of Marine Corps service.

6. Income Tax Returns.

a. Where did you file your last federal and state income tax returns, and for what years?

San Francisco, for 1953.

7. Bank Accounts and Safe Deposit Boxes.

a. What bank accounts have you maintained, alone or together with any other person, and in your own or any other name, within the two years immediately preceding the filing of the original petition herein?

Commercial account at American Trust Co., 3rd & Palou Office, in name of Stag Liquors. Bankrupt only person authorized to draw on this account.

Commercial account at same bank in name of Al Sanfilippo. Transferred to Marina Branch around December, 1953. Bankrupt only person authorized to draw on this account.

b. What safe deposit box or boxes or other depository or depositories have you kept or used for your securities, cash or other valuables, within the two years immediately preceding the filing of the original petition herein?

Never had a safe-deposit box or access to anyone else's safe-deposit box.

8. Property Held in Trust.

a. What property do you hold in trust for any other person?

None.

9. Prior Bankruptcy or Other Proceedings; Assignments for Benefit of Creditors.

a. What proceedings under the Bankruptcy Act have been brought by or against you during the six years immediately preceding the filing of the original petition herein?

None.

b. Was any of your property, at the time of the filing of the original petition herein, in the hands of a receiver or trustee?

No, except for $4,054.88 held by the Board of Trade of San Francisco.

c. Have you made any assignment of your property for the benefit of your creditors, or any general settlement with your

creditors, within the two years immediately preceding the filing of the original petition herein?

On December 17, 1953, made a general assignment of all assets of the business to the Board of Trade of San Francisco for the benefit of my creditors.

10. Loans Repaid.

a. What repayment of loans have you made during the year immediately preceding the filing of the original petition herein?

Regular monthly payments as follows:

(1) American Trust Company on chattel mortgage on automobile. Originally about $1,650; monthly payments $68.23; paid down to $1,298.65.

(2) Morris Plan—Unsecured business loan $1,500.00; monthly payments $94.00; fully paid off.

(3) Anglo-California Nat'l Bank—On chattel mortgage on furniture; original loan $700.00; monthly payments $58.35; present balance $232.80.

11. Transfer of Property.

a. What property have you transferred or disposed of, other than in the ordinary course of business, during the year immediately preceding the filing of the original petition herein?

12. Accounts Receivable.

a. Have you assigned any of your accounts receivable during the year immediately preceding the filing of the original petition herein?

Assignment to Board of Trade—see 9c above.

Assigned certain delinquent accounts to Atlas Credit Association, 1005 Market St., San Francisco, for collection; all others to Board of Trade under general assignment.

13. Losses.

a. Have you suffered any losses from fire, theft or gambling during the year immediately preceding the filing of the petition herein?

No.

* * *

/s/ ALFONSO PAUL SANFILIPPO,
Bankrupt.

State of California,
City and County of San Francisco—ss.

I, Alfonso Paul Sanfilippo, the person who subscribed to the foregoing statement of affairs, do hereby make solemn oath that the answers therein contained are true and complete to the best of my knowledge, information, and belief.

/s/ ALFONSO PAUL SANFILIPPO,
Bankrupt.

Subscribed and sworn to before me this 23rd day of April, 1954.

[Seal] /s/ ADA V. PENNINGTON,
Notary Public in and for the City and County of San Francisco, State of California.

Schedule A—Statement of All Debts of Bankrupt

Schedule A-1.

Statement of All Creditors to Whom Priority Is Secured by the Act

Claims Which Have Priority	Amount Due or Claimed
a. Wages due workmen, servants, clerks, or traveling or city salesmen on salary or commission basis, whole or part time, whether or not selling exclusively for the bankrupt, to an amount not exceeding $600 each, earned within three months before filing the petition. None	$ 0.00
b. Taxes due and owing to—	
(1) The United States: Director of Internal Revenue, 100 McAllister St., San Francisco, Calif., 4th quarter of 1953, withholding and F.I.C.A. contributions	Unknown
(2) The State. None	0.00
(3) The county, district or municipality of. None	0.00

c.

(1) Debts owing to any person, including the United States who by the laws of the United States is entitled to priority. None	$ 0.00
(2) Rent owing to a landlord who is entitled to priority by the laws of the State of....., accrued within three months before filing the petition, for actual use and occupancy. None	0.00
Total	$ 0.00

/s/ ALFONSO PAUL SANFILIPPO,
Petitioner.

Schedule A-2.

Creditors Holding Securities

[N. B.—Particulars of securities held, with dates of same, and when they were given, to be stated under the names of the several creditors and also particulars concerning each debt, as required by the Act of Congress relating to bankruptcy, and whether contracted as partner or joint contractor with any other person; and if so, with whom.]

	Value of Securities	Amount Due or Claimed
American Trust Company, 1 Grant Avenue, San Francisco, Calif.—Chattel mortgage on 1953 Ford Tudor Sedan	$1,300.00	$ 1,298.65
Anglo-California National Bank, Park-Merced Branch, San Francisco, Calif.—Chattel mortgage on furniture	500.00	232.80
Veteran's Administration, 49-4th Street, San Francisco, Calif.—Loan on National Service life insurance policy, $2,500.00 face value, 20-year endowment; monthly premium approximately $7.90; amount of loan approximately $480.00; surrender value approximately $480.00		480.00
Total		$ 2,011.45

/s/ ALFONSO PAUL SANFILIPPO,
Petitioner.

Schedule A-3.

Creditors Whose Claims Are Unsecured

[N. B.—When the name and residence (or either) of any drawer, maker, indorser, or holder of any bill or note, etc., are unknown, the fact must be stated, and also the name and residence of the last holder known to the debtor. The debt due to each creditor must be stated in full, and any claim by way of set-off stated in the schedule of property.]

Reference to Ledger or Voucher		Amount Due or Claimed
1.	Acme Breweries, 762 Fulton St., San Francisco, Calif.	$ 326.40
2.	Alexandria Distributing Co., 180 Townsend St., San Francisco, Calif.	598.57
3.	Alpha Distributing Co., 480-2nd St., San Francisco, Calif.	347.82
4.	American Burglar Alarm, 165 Jessie St., San Francisco, Calif.	12.96
5.	Anheuser-Busch, Inc., 1650-3rd St., San Francisco, Calif.	Unknown
6.	Arbasetti, Carlo, 1194 Hollister Ave., San Francisco, Calif	74.95
7.	Atlas Paper Co., 740 Folsom St., San Francisco, Calif.	66.99
8.	Atkins, Robert S., 150 Sutter, San Francisco, Calif.	10.70
9.	Bailey, Dr. Oliver, 490 Post St., San Francisco, Calif.	Unknown
10.	Baruh Liquors, Inc., 256 N. First St., San Jose, Calif.	72.34
11.	Brown & Bigelow, St. Paul, Minn.	23.24
12.	California Wine Association, 900 Minnesota St., San Francisco, Calif.	98.66
13.	Cervelli, N. & Co., 3319 Fillmore St., San Francisco, Calif.	86.51
14.	Eagle Vineyard Products Co., 1020 Folsom St., San Francisco, Calif.	29.16
15.	Falstaff Brewing Corporation, 468 Main P. O., San Francisco, Calif.	1,343.37
16.	Firemen's Insurance Co. of Newark, N. J., 220 Bush St., San Francisco, Calif.	20.86

17.	Gallo Sales Co., 1001 Brannan St., San Francisco, Calif.	$ 96.52
18.	Glaser Brothers, 422-2nd St., San Francisco, Calif.	497.61
19.	Goebel Brewing Co. of California, 533 Kirkham, Oakland, Calif.	204.64
20.	Golden Bear Wine Co., 1077 McAllister St., San Francisco, Calif.	131.17
21.	Golden Brand Bottling Co., 275 Barneveld Ave., San Francisco, Calif.	54.50
22.	Haas Brothers, 2nd & Channel Sts., San Francisco, Calif.	489.95
23.	Jones, Dr. Gertrude Flint, 490 Post St., San Francisco, Calif.	15.00
24.	Juillard, Inc., 840 Tennessee St., San Francisco, Calif.	535.06
25.	Lauricella, Felix, Attorney at Law, 68 Post St., San Francisco, Calif.	225.00
26.	Macy's, Stockton & O'Farrell Sts., San Francisco, Calif.	13.41
27.	Marino, Edwin J., 1600 McKinnon Ave., San Francisco, Calif.	453.58
28.	McKesson & Robbins, Inc., Box 836, Main P.O., San Francisco, Calif.	1,165.47
29.	Millett, J. C., Co., 118 Sacramento St., San Francisco, Calif.	278.77
30.	Montali, Ralph, Inc., 548-3rd St., San Francisco, Calif.	345.53
31.	Monteverde & Parodi, 100 Broadway, San Francisco, Calif.	409.83
32.	Pabst Sales Co., 475 Main St., San Francisco, Calif.	98.22
33.	Pacific Coast Brands, 2700-18th St., San Francisco, Calif.	193.85
34.	Pacific Gas & Electric Co., 245 Market St., San Francisco, Calif.	34.73
35.	Pacific Tel & Tel Co., 444 Bush St., San Francisco, Calif.	16.32
36.	Peters, Albert Co., The, 1544 Pine St., San Francisco, Calif.	106.25
37.	Petri Distributing Co., 655-4th St., San Francisco, Calif.	58.04

38. Rathjen Bros., Inc., 135 Berry St., San Francisco, Calif. ..... $ 768.24
39. Rathjen Co., Harry F., 2607 Cypress St., Oakland, Calif. 38.40
40. Safe Realty Co., 2344 Judah St., San Francisco, Calif. 156.25
41. Sanfilippo, Providenza and Venerando, 2320 Filbert St., San Francisco, Calif. 13,824.33
42. San Francisco Brewing Corporation, 490-10th St., San Francisco, Calif. 461.77
43. San Francisco Water Dept., 425 Mason St., San Francisco, Calif. 8.39
44. Sobel, Max, Wholesale Liquors, 240-2nd St., San Francisco, Calif. 691.80
45. Sosnick, Melvin Co., 801 McAllister St., San Francisco, Calif. 56.99
46. Sunset Scavenger Co., Ft. of Tunnel Ave. & Beatty Road, San Francisco, Calif. 1.50
47. Thanos, A. K., 480-2nd St., San Francisco, Calif. 982.88
49. Twin Peaks Distributing Co., 1050-25th St., San Francisco, Calif. 118.09
50. Vick's Distributing Co., 2341 San Pablo, Oakland, Calif. 237.52
51. Whately, William C., 228 Paul Ave., San Francisco, Calif. (disputed claim) 195.00

Total $26,107.14

Please Send Notices to: Board of Trade of San Francisco, 444 Market St., San Francisco, Calif.; Labor Commissioner of the State of California, 965 Mission St., San Francisco, Calif.

/s/ ALFONSO PAUL SANFILIPPO,
Petitioner.

Schedule A-4.

Liabilities on Notes or Bills Discounted Which Ought to Be Paid by the Drawers, Makers, Acceptors, or Indorsers

None ..... $ 0.00

/s/ ALFONSO PAUL SANFILIPPO,
Petitioner.

Schedule A-5.

Accommodation Paper

None ..... $ 0.00

/s/ ALFONSO PAUL SANFILIPPO,
Petitioner.

Oath to Schedule A

United States of America,
State of California,
City and County of San Francisco—ss.

I, Alfonso Paul Sanfilippo, the person who subscribed to the foregoing schedule, do hereby make solemn oath that the said schedule is a statement of all my debts, in accordance with the Act of Congress relating to bankruptcy, according to the best of my knowledge, information, and belief.

/s/ ALFONSO PAUL SANFILIPPO,
Petitioner.

Subscribed and sworn to before me this 23rd day of April, 1954.

/s/ ADA V. PENNINGTON,
Notary Public in and for the City and County of San Francisco, State of California.

Schedule B.—Statement of All Property of Bankrupt

Schedule B-1.

Real Estate

None ..... $ 0.00

/s/ ALFONSO PAUL SANFILIPPO,
Petitioner.

Schedule B-2.

Personal Property

A.	Cash on hand. None	$ 0.00
B.	Negotiable and non-negotiable instruments and securities of any description, including stock in incorporated companies, interests in joint stock companies, and the like (each to be set out separately). None	0.00
C.	Stock in trade. None	0.00
D.	Household goods and furniture, household stores, wearing apparel and ornaments of the person.—Household goods and furniture owned by the bankrupt and his wife and located at their place of residence, 1320 Lombard St., San Francisco, and wearing apparel of the bankrupt. (Claimed Exempt.)	1,300.00
E.	Books, prints and pictures.—Books, prints and pictures. (Claimed Exempt.)	50.00
F.	Horses, cows, sheep, and other animals, (with number of each).—None	0.00
G.	Automobiles and other vehicles.—1953 Ford Tudor V-8 automobile, subject to chattel mortgage of $1,298.65 in favor of American Trust Co.	1,300.00
H.	Farming stock and implements of husbandry.—None	0.00
I.	Shipping and shares in vessels.—None	0.00
J.	Machinery, fixtures, apparatus, and tools used in business, with the place where each is situated.—None	0.00
K.	Patents, copyrights, and trade-marks.—None	0.00
L.	Goods or personal property of any other description, with the place where each is situated.—None	0.00
	Total	$ 2,650.00

/s/ ALFONSO PAUL SANFILIPPO,
Petitioner.

Schedule B-3.

Choses in Action

A. Debts due petitioner on open account.—On December 17, 1953, approximately $900.00 was owed to the bankrupt, some of which had been assigned to the Acme Credit Bureau for collection. Remainder was turned over to the Board of Trade as part of the general assignment. How much has been collected is unknown to the bankrupt .... Unknown

B. Policies of insurance.—National Service Life Insurance policy, $2,500.00 face value; 20-year endowment; monthly premium approximately $7.90; surrender value approximately $480.00; subject to loan of approximately $480.00. (Claimed Exempt.) .....$ 480.00

Group Life Insurance policy while employed by present employer 0.00

Automobile Insurance. Full coverage. $100.00 deductible collision 0.00

C. Unliquidated claims of every nature, with their estimated value.—Property damage claim for $100.00 arising out of automobile accident. Suit on file being handled by attorney for insurance company 100.00

Property damage claim for $50.00 arising out of damage to parked car by Packard-Bell television service truck. Claim being handled by Safe Realty Co., 2344 Judah Street, San Francisco 50.00

D. Deposits of money in banking institutions and elsewhere.—On deposit in commercial account, American Trust Company, Marina Branch, San Francisco, Calif. 1.32

Total .....$ 631.32

/s/ ALFONSO PAUL SANFILIPPO,
Petitioner.

Schedule B-4.

Property In Reversion, Remainder, or Expectancy, Including Property Held in Trust for the Debtor or Subject to Any Power or Right to Dispose of or to Charge

	Estimated Value of Interest
Interest in land.—None	$ 0.00
Personal property.—None	0.00
Property in money, stock, shares, bonds, annuities etc.—None	0.00
Rights and powers, legacies and bequests.—None	0.00
Total	$ 0.00

Property Heretofore Conveyed for Benefit of Creditors

	Amount Realized as Proceeds of Property Conveyed
Portion of debtor's property conveyed by deed of assignment, or otherwise, for the benefit of creditors; date of such deed, name and address of party to whom conveyed; amount realized therefrom, and disposal of same, as far as known to debtor. Assets of business assigned to Board of Trade of San Francisco.	
Attorney's fees: Sum or sums paid to counsel, and to whom, for filing fees or costs and for services rendered or to be rendered in this bankruptcy. Bankrupt has paid to his attorneys, Messrs. Henry Gross and Francis P. Walsh, the sum of $50.00 on account of court costs in these proceedings.	
Total	$ 0.00

/s/ ALFONSO PAUL SANFILIPPO,
Petitioner.

Schedule B-5.

Property Claimed as Exempt From the Operation of the Act of Congress Relating to Bankruptcy

[N. B.—Each item of property must be stated, with its valuation, and, if any portion of it is real estate, its location, description and present use.]

	Valuation
Property claimed to be exempt by the laws of the United States, with reference to the statute creating the exemption.	
National Service Life Insurance policy, $2,500.00 face value, 20-year endowment, monthly premium approximately $7.90, subject to loan of approximately $480.00	$ 480.00
(Claimed exempt under provisions of Sec. 454a, Title 3, 38 U.S.C. Annotated.)	
Property claimed to be exempt by State laws, with reference to the statute creating the exemption.	
Chairs, tables, desks and books located at residence of bankrupt. (Claimed exempt under Sec. 690.1 C.C.P. of the State of California)	200.00
Necessary household furniture, table and kitchen furniture and equipment, wearing apparel, ornaments of the person, beds, bedding and bedsteads belonging to bankrupt. (Claimed exempt under Sec. 690.2 C.C.P. of the State of California)	1,100.00
Books, prints and pictures. (Claimed exempt under Sec. 690.2 C.C.P. of the State of California)	50.00
Total	$ 1,830.00

/s/ ALFONSO PAUL SANFILIPPO,
Petitioner.

Schedule B-6.

Books, Papers, Deeds, and Writings Relating to Debtor's Business and Estate

The following is a true list of all books, papers, deeds and writings relating to petitioner's trade, business, dealings, estate and effects, or any part thereof, which, at the date of this petition, are in petitioner's possession or under petitioner's custody and control, or which are in the possession or custody of any person in trust for petitioner, or for petitioner's use, benefit, or advantage; and also of all others which have been heretofore, at any time, in petitioner's possession, or under petitioner's custody or control, and which are now held by the parties whose names are hereinafter set forth, with the reason for their custody of the same.

Books.—Books of accounts and records pertaining to the business and affairs of bankrupt are in possession of the Board of Trade of San Francisco, 444 Market Street, San Francisco, California.

Deeds.—None.

Papers.—Papers, bills, etc., pertaining to the business and affairs of bankrupt are in possession of the Board of Trade of San Francisco.

/s/ ALFONSO PAUL SANFILIPPO,
Petitioner.

Oath to Schedule B

United States of America,
State of California,
City and County of San Francisco.—ss.

I, Alfonso Paul Sanfilippo, the person who subscribed to the foregoing schedule, do hereby make solemn oath that the said schedule is a statement of all my property, real and personal, in accordance with the Act of Congress relating to bankruptcy, according to the best of my knowledge, information, and belief.

/s/ ALFONSO PAUL SANFILIPPO,
Petitioner.

Subscribed and sworn to before me this 23rd day of April, 1954.

/s/ ADA V. PENNINGTON,
Notary Public in and for the City and County of San Francisco, State of California.

Summary of Debts and Assets

[From the statements of the debtor in Schedules A and B.]

Schedule A

1-a	Wages	$ 0.00
1-b (1)	Taxes due United States (Unknown)	0.00
1-b (2)	Taxes due States	0.00
1-b (3)	Taxes due counties, districts and municipalities	0.00
1-c (1)	Debts due any person, including the United States, having priority by laws of the United States	0.00
1-c (2)	Rent having priority	0.00
2	Secured claims	2,011.45
3	Unsecured claims	26,107.14
4	Notes and bills which ought to be paid by other parties thereto	0.00
5	Accommodation paper	0.00
	Schedule A, Total	$28,108.59

Schedule B

1	Real Estate	$ 0.00
2-a	Cash on hand	0.00
2-b	Negotiable and non-negotiable instruments and securities	0.00
2-c	Stock in trade	0.00
2-d	Household goods	1,300.00
2-e	Books, prints, and pictures	50.00
2-f	Horses, cows, and other animals	0.00
2-g	Automobiles and other vehicles	1,300.00
2-h	Farming stock and implements	0.00
2-i	Shipping and shares in vessels	0.00
2-j	Machinery, fixtures, and tools	0.00
2-k	Patents, copyrights, and trade-marks	0.00
2-l	Other personal property	0.00
3-a	Debts due on open accounts (Unknown)	0.00
3-b	Policies of insurance	480.00
3-c	Unliquidated claims	150.00
3-d	Deposits of money in banks and elsewhere	1.32

4	Property in reversion, remainder, expectancy or trust	0.00
5	Property claimed as exempt ($1,830.00)	
6	Books, deeds and papers	0.00
	Schedule B, Total	$ 3,281.32

/s/ ALFONSO PAUL SANFILIPPO,
Petitioner.

[Endorsed]: Filed April 26, 1954.

[Title of District Court and Cause.]

CERTIFICATE AND REPORT OF REFEREE RELATIVE TO PETITION FOR REVIEW OF REFEREE'S ORDER OF MAY 26, 1954

To Honorable Oliver D. Hamlin, United States District Judge for the Northern District of California:

I, Burton J. Wyman, one of the referees in bankruptcy of the above-entitled court and the referee in charge of the above-entitled proceeding, hereby respectfully certify and report:

On May 20, 1954, after due notice to interested parties, the first meeting of creditors was held before the undersigned referee in bankruptcy.

At said meeting there were present, among others, the bankrupt, in person, and Henry Gross, Esq., one of the bankrupt's attorneys; Arthur P. Shapro, Esq., on behalf of certain creditors; Max H. Margolis, Esq., on behalf of certain creditors; John M.

England and Kal W. Lines, each of the latter being a candidate for the trusteeship herein.

During said meeting the following took place:

"The Referee: Election of trustee.

"Mr. Margolis: I have one claim for $220.00, your Honor, that I vote for Kal W. Lines as trustee.

"The Referee: Any other nominations?

"Mr. Shapro: Yes, your Honor. I have 19 claims, totaling $4,314.82, running to my office, and one claim for $193.85 for Mr. England, all of which claims I vote for John M. England.

"Mr. Lines: I have three votable claims, your Honor, totaling $293.46, which I vote for myself as trustee.

"The Referee: Do you want to check the claims?

"Mr. Margolis: Yes, your Honor.

"The Referee: We will pass the matter and give you a chance to check the claims.

"(Recess.)

"The Referee: Have you agreed to disagree?

"Mr. Shapro: Yes. We have agreed to disagree.

"Mr. Margolis: We have agreed, your Honor, that for Mr. Lines there are three claims in the amount of $407.22, to which no objection is made.

"And the claims voted by Mr. Shapro for Mr. England to which there are no objections are: One claim for $193.85.

"Now, there is a group of claims Mr. Shapro has presented to us for examination; they are all similar in form and I believe there are 19. Is that correct?

"Mr. Shapro: That is right.

"Mr. Margolis: And they were solicited by a letter—Mr. Shapro was fair enough to show it to us and we would like to show it to your Honor—by the Board of Trade.

"Mr. Shapro: We do not agree to the statement; we did not say they were solicited by the Board of Trade. I say this is the letter by which they were solicited. As to what that solicitation is, is a matter we are going to argue about in due course; I hope.

"The Referee: Sent out by the Board of Trade?

"Mr. Shapro: Members of the Creditors Committee; yes, sir.

"The Referee: And the Creditors Committee were all members of the Board of Trade?

"Mr. Shapro: I would like to offer some proof on that. I am not sure of it. I will not speak whereof I am not sure. Mr. Singer, will you be sworn, please?

"BENJAMIN SINGER

"called as a witness, sworn.

"The Referee: Q. What is your full name, Mr. Singer?

"A. Benjamin Singer.

"The Referee: Proceed.

"Mr. Shapro: Q. Mr. Singer, you are employed by Mr. Conners, the attorney for the Board of Trade of San Francisco. Is that right?

"A. That is correct.

"Q. I show you a form of letter dated April 23, 1954, on the letterhead of The Board of Trade of San Francisco, addressed to the Creditors of Al-

fonso Paul Sanfillippo, which purports to be signed by the Creditors' Committee composed of Falstaff Brewing Corp.; A. K. Thanos Co.; Rathjen Brothers, Inc.; Max Sobel Wholesale Liquors; and Haas Brothers. And I ask you if you know, will you tell the Court whether or not all these members of the Creditors Committee are members of the Board of Trade of San Francisco?

"A. I think they are.

"Q. Including Falstaff Brewing Corp.?

"A. Including Falstaff Brewing Corp.

"Q. 'Flastaff' then is a misprint here?

"A. I think the correct name is Falstaff.

"Q. All are members of the Board of Trade?

"A. Yes.

"Q. Mr. Singer, do you know of your own knowledge the circumstances under which this letter was prepared and transmitted?

"Mr. Margolis: I object on the ground that it is totally incompetent, irrelevant and immaterial.

"The Referee: What is the materiality?

"Mr. Shapro: The materiality of it, if your Honor please, is that I propose to show if I can get an answer from a subsequent question, I propose to show the transmission of this letter and its preparation in this form was at the express instance and request of the members of the Creditors' Committee.

"The Referee: The objection is sustained.

"Mr. Shapro: May I make an offer of proof, if your Honor please?

"The Referee: Surely.

"Mr. Shapro: At this time, I propose to prove through this witness that the letter in question and the form of claim, or proof of claim which has been offered for voting here which accompanied in each case the letter to the creditors involved, was prepared by this witness, dictated by him and mimeographed in the offices of the Board of Trade of San Francisco and transmitted by that office at the request of the five members of the Committee named in the letter. The designation of the power of attorney, or the names of the attorneys both in the letter and proof of claim and the letter of attorney for my office were so entered at the request of the five members of the Committee named in the letter.

"I also propose to show, if your Honor please, by Mr. Singer, that neither the Assignee for the Benefit of Creditors nor the attorney for the Assignee for the Benefit of Creditors, nor any member of the Board of Trade's staff itself either suggested or in anywise indicated to the creditors to whom the letters were addressed or to the members of the Creditors' Committee, which caused the letter to be sent, the designation of the attorneys-in-fact nor the powers of attorney in the claims referred to in the letter.

"I also propose to show by this witness, and I make it part of this offer to prove, that at no time prior to the announcement in court here by me of the candidate for trustee, whom I nominated, was the name of any candidate suggested or known to this witness or any of the members of the Creditors'

Committee or any member of the Board of Trade of San Francisco.

"I propose by my own testimony—I might as well make it part of this offer of proof—I propose by my own testimony to testify I consulted with no one, no member of the committee, no member of the Board of Trade or its legal staff or employees, with reference to the candidate for trustee, John M. England, whom I have nominated here.

"I also propose to show by my own testimony here that Mr. England, John M. England, has received no information even to this time of my intention to nominate him, nor has he any connection with or is employed by any member of the Creditors' Committee or the Board of Trade of San Francisco.

"I also propose to show, if your Honor please, by my own testimony that the estate, this bankrupt estate, so far as within the power of the trustee nominated by me, if elected and the election is approved by the Court, would be administered fully, fairly, and honestly, and the fact that there was an assignment to the Secretary of the Board of Trade of San Francisco by the bankrupt within four months immediately preceding the bankruptcy would not in any way influence him in the administration of the estate, nor influence anyone, so far as I know, in the administration of the estate.

"I make the offer of proof as stated for the purposes indicated so your Honor may know, shall I call it the theory upon which I predicate the showing and, therefore, the offer of proof. I refer your

Honor—I am going back a long way—to the Max Belling case in Oakland, in which your Honor ruled; an exactly parallel case without exception except for the change of names. In other words, the powers of attorney in that case were running to our mutual friend, Clarence Shuey, I being in the same position Mr. Margolis is here. The nominee in those days, the nominee of Mr. Shuey, on the claims of Mr. Shuey, was William Dean. This, not being such solicitation as is prohibited by the Bankruptcy Act or the General Orders, the only basis on which the claims can be disqualified, not voted, is on the basis of being claims of persons who might have interests adverse to the trustee. Therefore, the claims are entirely proper for voting purposes; the nominee is not disqualified and, therefore, the claims should be permitted to vote.

"And the evidence I offer in the form of this offer of proof is competent, material and relevant to those issues.

"Mr. Margolis: I appreciate it is not a situation we might be confronted with after a receiver has been appointed, but I do feel, your Honor, there would be an adverse interest, in this, that the Board of Trade has been an assignee in this matter and no doubt has incurred some expense, for which they will make application for reimbursement. All the work that was done was done by Mr. Singer, an employee of the Board of Trade. In view of the fact that there was an assignment and it appears from the schedules and the testimony of the bankrupt that the Assignee would be required to account here,

it seems to me there is such a direct interest there that these claims cannot be voted for the purpose intended, notwithstanding the power run to the office of Shapro & Rothschild, because it appears to me to be an attempt to do indirectly what could not be done directly. The mere striking out of Mr. Conner's name on all the claims and the substitution of 'A. P. Shapro or A. B. Rothschild and/or the Office of Shapro & Rothschild,' I do not think clears that defect. The Board of Trade being the Assignee and the Committee being composed, as Mr. Singer has testified, of all members of the Board of Trade, can they accomplish the purpose here attempted to be accomplished? And, so, for the record, I object to the offer made by Mr. Shapro on the ground that it is incompetent, irrelevant and immaterial.

"Mr. Shapro: If your Honor please, may I answer counsel's argument?

"The Referee: Yes.

"Mr. Shapro: In two respects. In the first place, the Statute, Sec. 69, requires the assignee for the benefit of creditors to account; it does not require him to account to the trustee; it requires him to account to this court. Therefore, if the Assignee for the Benefit of Creditors will, and I agree with counsel, he will have to account to this court for his administration of the receipts and disbursements under the assignment, the question of the trusteeship or the nominee who becomes trustee will have no bearing whatever on the accuracy or sufficiency of his accounting within the limits of the rulings of this Court.

"If I may, I should like to direct a question to Mr. Margolis in connection with this objection, so the record may be clear. I would like to know if it is your contention, Mr. Margolis, that if Mr. England's election as trustee in this case were approved by this Court, that he would administer this estate other than impartially, fairly, and accurately?

"Mr. Margolis: Absolutely not. But I would like to make this statement: You will stipulate that the Board of Trade is a non-profit organization?

"Mr. Shapro: Yes.

"Mr. Margolis: Supported by members who pay dues for the expenses?

"Mr. Shapro: They do.

"Mr. Margolis: I did not say the Board of Trade here would have to account, if it please your Honor, to the trustee, whosoever may be elected. But, on the basis of the answer to my question here, the Board of Trade has an interest in this matter to be reimbursed for any expenses it incurred. The Creditors' Committee, being members of the Board of Trade, would have to make up any deficiency, it not being a profit making organization. Therefore, it seems to me it would be sufficient interest, where the Board of Trade took an active part in securing these powers of attorney, to disallow the election on the basis of the claims before this Court.

"Mr. Shapro: If your Honor please, I interrupted myself. I did not finish; I was just giving an answer to the second point, which counsel has raised again.

"The answer to the second point is this: The

allowance of expenses to the Assignee for the Benefit of Creditors, who was Mr. Hempy, the Secretary of the Board of Trade, is a matter strictly within your Honor's prerogative upon the filing of an application for allowance or reimbursement. If they were paid, your Honor would have to approve them; if they were not paid, your Honor would have to allow them. I take the position, if your Honor please, that the solicitation in this case, even if it were made by the Board of Trade, would not debar the claims from voting, for the reasons previously stated.

"Also, I take the position, if your Honor please, that this was not a solicitation by the Board of Trade except the Board of Trade's facilities and letterhead were used for the transmission of a letter, but, as I propose to prove by the testimony of the witness, it was at the express instructions of the people who signed it, the members of the Creditors' Committee. It is true there might be a difference between us with regard to the fact that the members of the Creditors' Committee are members of the Board of Trade. I take the position that if your Honor should disallow—this is quite important—if your Honor should, in the exercise of your discretion, disallow any item of expense or reimbursement, as the case may be, in the future, of the Assignee for the Benefit of Creditors, it would not be the Board of Trade of San Francisco nor any member of the Board of Trade of San Francisco who would suffer the financial loss. If such a thing should happen, of course I assume it won't, but if

it did happen, the one who would suffer would not be the Board of Trade; it would be Walter J. Hempy, the Assignee. The Board of Trade is not the Assignee in the case, nor are the members the assignee, nor is there any evidence, nor is it the fact that the members of the Creditors' Committee as such procured the assignment.

"I am fully familiar with the conditions. I feel I am fully familiar with the question of improper solicitation. That is one thing and the statute and the General Orders, which have the same force and effect, expressly put in certain methods of solicitation with which we are all familiar. We don't have that situation here. I reiterate, the only possible basis upon which the objection to the voting of these claims can be sustained as a matter of law—I believe it to be consistent not only with other courts' rulings, but your Honor's rulings in previous cases and that is why I am urging so strongly that entirely consistent with your Honor's previous rulings and the rulings of other courts in similar instances, that the only basis on which the claims can be debarred from voting or the objections sustained is on the ground that the nominee, if elected, would not fairly and honestly administer the estate. Counsel conceded such is not his contention. Therefore, we submit the nomination of Mr. England in this matter should be approved. Of course, I mean, if such should be your Honor's ruling if the facts are as I stated in my offer of proof, that before your Honor rules, the evidence I offer to prove, I should be permitted to prove.

"Mr. Margolis: We make no charge, your Honor, of improper solicitation. Mr. Shapro knows there was no indication of it when we went over these claims. But, I do feel there is an attempt here to do indirectly what cannot be done directly. The members of the Creditors' Committee indicate in the letter that they are part and parcel of the Board of Trade of San Francisco:

> " 'The undersigned Committee, appointed at the general meeting of creditors held at the Board last December, desires your co-operation in the selection of a competent trustee at the first meeting of creditors, and there is enclosed appropriate form of proof and letter of attorney with instructions attached.'

"Now, these individuals or companies or corporations are part and parcel of the Board of Trade of San Francisco and they use the facilities of the Board of Trade. I say again, any charges of the Assignee is a charge representing an adverse interest against the estate. I don't mean it would be improper in any way. It would be an attempt, properly made, to be reimbursed for handling the matter during this assignment.

"We feel, under these circumstances, the claims should not be allowed to vote, when they were solicited in the manner indicated in the letter.

"Mr. Shapro: So far as I am concerned, I would feel our position was exactly the same if the Board of Trade, over the signature of one of its own

officers as distinguished from a member of the Creditors' Committee, solicited the claims under the same conditions, so long as they voted for a person who, so far as the record and the contention of counsel is concerned, would honestly and fairly administer the estate, other than the Assignee. We know a man cannot wear two hats. We have here, if I may say so, we have independent counsel. I state to your Honor that for over ten years past, personally I have represented practically every one of these liquor houses. We have Mr. England, whose integrity so far as the administration of the estate is concerned is conceded. I say to your Honor, under those conditions, these nineteen creditors' claims approximately totalling $5,000.00, should not be disenfranchised in favor of three creditors for $400.00.

"I have just made my offer of proof and to the offer of proof, Mr. Margolis has an objection pending.

"The Referee: Mr. Margolis' objection to the offer of proof goes to Mr. Shapro's testimony also, if he is allowed to give it?

"Mr. Margolis: That is correct.

"The Referee: May we have the letter in evidence?

"Mr. Shapro: Oh, surely.

"The Referee: Who is offering it?

"Mr. Shapro: We can make it a joint exhibit.

"The Referee: Joint Exhibit No. 1.

"(The letter referred to above was admitted in evidence as Joint Exhibit No. 1.)

"The Referee: The matter may be submitted.

"(Continued to May 27, 1954—10:00 a.m.)"

On May 26, 1954, the undersigned referee in bankruptcy signed and filed the order which is complained of in the petition for review that was filed herein on June 7, 1954, and is as follows:

"Come now the following creditors of the above estate, viz.:

"Falstaff Brewing Corp.,
"Goebel Brewing Company of California,
"Monteverde & Parodi, Inc.,
"Ralph Montali, Inc.,
"Pacific Gas & Electric Company,
"Pabst Brewing Company,
"Harry F. Rathjen Co.,
"San Francisco Brewing Corporation,
"Melvin Sosnick Company,
"Twin Peaks Distributing Co.,
"Vick's Distributing Company,
"N. Cervelli & Company,
"California Wine Association,
"Brown & Bigelow,
"Carlo Arbasetti,
"The Albert Peters Co.,

and respectfully represent:

"That heretofore and on the 26th day of May, 1954, Honorable Burton J. Wyman, Referee in Bankruptcy herein, made and entered herein that certain 'Summary of Record, Findings of Fact and Conclusions of Law Relative to Contest Over Elec-

tion of Bankruptcy Trustee' and Orders thereon, a full, true and correct copy of which is hereto annexed, marked 'Exhibit "A," ' and hereby expressly referred to and made part hereof; that the aforesaid Referee's orders so made and entered herein on the said 26th day of May, 1954, were and are erroneous and contrary to law in each and all of the following particulars:

"(1) That neither said Referee's orders nor his Findings and/or Conclusions therein contained are supported by, and that said Referee's said orders, Findings and/or Conclusions therein contained are contrary to, the records, papers and files herein.

"(2) That of the said Findings of Fact made by said Referee, those numbered (5) and (8) are wholly unsupported by the evidence adduced before said Referee and are contrary to the evidence sought to be introduced by and offered by your Petitioners in support of John M. England, the candidate of your Petitioners for election as Trustee of the above estate, and said evidence was refused by said Referee in Bankruptcy.

"(3) That of the said purported Findings of Fact made by said Referee, those numbered (9) and (10) are, in effect, conclusions of the said Referee and not findings of fact and, in any event, are not supported by the evidence received by said Referee in Bankruptcy upon the issues involved herein and are contrary to the evidence sought to be introduced and offered by your Petitioners in support of J. M. England, the candidate of your

Petitioners for election as Trustee of the above estate, and said evidence was refused by said Referee in Bankruptcy.

"(4) That the Conclusions of Law made by said Referee and numbered (1), (2), (3) and (4) are, and each of them is, contrary to law, is unsupported by valid findings of fact and/or is unsupported by the records, papers and files herein.

"(5) That said Referee in Bankruptcy improperly refused to accept evidence offered by your Petitioners and/or contained in the offer of proof made by your Petitioners in support of their said voting of said claims for said Trustee and improperly sustained objections thereto, notwithstanding the fact that the grounds of said objections were and are untenable in law and not based on any competent evidence adduced by said Objectors and contained in the records of this proceeding.

"(6) That by reason of the aforesaid rulings and/or orders of said Referee in Bankruptcy your Petitioners were disenfranchised and were not permitted to vote for the candidate of their selection as Trustee of the estate of the above-named Bankrupt notwithstanding the fact that it was conceded by the Objectors to the voting of the said claims of your Petitioners as aforesaid, that if the election of your Petitioners' said candidate, John M. England, as such Trustee, were to be approved by this Court that said John M. England would administer said estate impartially, fairly, and accurately (See Reporter's Transcript of hearing, May 20, 1954,

page 8, lines 5-13); and notwithstanding the fact that there was no showing made in support of the said objections interposed to the voting of your Petitioners' said claims for said Trustee; that said Petitioners, or any of them, or their attorney in fact had any interest or was likely to have an interest adverse to the said bankrupt estate and/or of any of the creditors thereof.

"(7) That it affirmatively appears from the evidence received by said Referee in Bankruptcy and from the evidence offered by your Petitioners and improperly, as aforesaid, rejected by said Referee in Bankruptcy that contrary to said Referee's purported Finding No. (9), it was not the intent of, nor was any effort whatever made by or on the part of the said Creditors' Committee, acting for said Board of Trade, indirectly or otherwise to keep, if possible, some or any sort of control over the assets of the estate of the above-named Bankrupt to the extent of said purported Finding No. (9) set forth to any extent or at all; and that it affirmatively appears therefrom that the selection of the nominee for Trustee of the estate voted for by your Petitioners, including the members of said Creditors' Committee and other members of the Board of Trade and other non-members of the Board of Trade was made solely by your Petitioners' attorney in fact, Arthur P. Shapro, Esq., without prior consultation with or instructions or advice from said Creditors' Committee, the said Board of Trade, or any member, officer or employee thereof.

"Wherefore, your Petitioners pray that the

aforesaid Referee's orders made and entered herein on the said 26th day of May, 1954 (a true copy of which is hereto annexed as 'Exhibit A' hereof), may be, by the Judge of the above-entitled Court, reviewed and reversed; and that said Referee in Bankruptcy be by the said Judge directed to overrule the objections to and to admit and receive the evidence offered by your Petitioners in support of the votability of their said claims, and in the absence of contrary proof thereon directing said Referee to approve the election of said John M. England as Trustee of the above estate in lieu and instead of Cal W. Lines, all after due proceedings to be had herein in accordance with Section 39(c) of the Bankruptcy Act; or for such other, further and different order or relief as to this Honorable Court may seem just in the premises.

"FALSTAFF BREWING CORP.,
"GOEBEL BREWING COMPANY OF CALIFORNIA,
"MONTEVERDE & PARODI, INC.,
"RALPH MONTALI, INC.,
"PACIFIC GAS & ELECTRIC COMPANY,
"PABST BREWING COMPANY,
"HARRY F. RATHJEN CO.,
"SAN FRANCISCO BREWING COMPORATION,
"MELVIN SOSNICK COMPANY,
"TWIN PEAKS DISTRIBUTING CO.,
"VICK'S DISTRIBUTING COMPANY,
"N. CERVELLI & COMPANY,
"CALIFORNIA WINE ASSOCIATION,

"BROWN & BIGELOW,
"CARLO ARBASETTI,
"THE ALBERT PETERS CO.,
"Petitioners;
"By /s/ ARTHUR P. SHAPRO,
"Their Attorney-in-Fact.

"United States of America,
"Northern District of California,
"City and County of San Francisco—ss.

"Arthur P. Shapro, being first duly sworn, deposes and says:

"That he is one of the attorneys for the Petitioners named herein, and as such is duly authorized to and does make this verification on behalf of said Petitioners; that he has read said Petition, knows the contents thereof, and hereby makes solemn oath that the statements therein contained are true, according to the best of his knowledge, information and belief.

"/s/ ARTHUR P. SHAPRO.

"Subscribed and sworn to before me this 7th day of June, 1954.

"[Seal] /s/ FRANCES R. WIENER,
"Notary Public in and for the City and County of San Francisco, State of California."

The aforesaid complained of order, a copy of which was, and is, attached to the aforesaid petition for review and which said order is therein referred to as "Exhibit 'A,' " is as follows:

EXHIBIT A

In the Southern Division of the United States District Court for the Northern District of California

No. 42878—In Bankruptcy

In the Matter of:

ALFONSO PAUL SANFILIPPO,

Bankrupt.

SUMMARY OF RECORD, FINDINGS OF FACT AND CONCLUSIONS OF LAW RELATIVE TO CONTEST OVER ELECTION OF BANKRUPTCY TRUSTEE

This matter comes before the court under the following circumstances:

(1) On December 17, 1953, the above-named Alfonso Paul Sanfilippo made a general assignment for the benefit of creditors in which said assignment Walter J. Hempy was named as the assignee.

(2) Thereafter certain action was and/or certain actions were taken by and/or through said Walter J. Hempy, characterized as aforesaid, with reference and/or relative to the affairs and/or property of said Alfonso Paul Sanfilippo, at certain meetings held at the Board of Trade of San Francisco and at which said meetings certain members and/or employees of the Board of Trade were present and participated.

(3) On April 16, 1954, said Alfonso Paul Sanfilippo filed in the above-entitled court his voluntary petition to be adjudged a voluntary bankrupt.

(4) Thereafter, and on April 16, 1954, Alfonso Paul Sanfilippo was adjudged a bankrupt, by the above-entitled court and the above-entitled bankruptcy proceeding was referred, primarily, to the undersigned referee in bankruptcy to take such further proceedings therein as are required and permitted by the Bankruptcy Act.

(5) On, or about, April 23, 1954, a certain form letter was prepared and copies thereof mailed to creditors, the facilities of said Board of Trade and/or its membership being used in the preparation of said letter.

(6) On May 20, 1954, the first meeting of creditors, after due notice to interested parties had been given, was held, before the undersigned referee in bankruptcy, at Room 609 Grant Building, 1095 Market Street, San Francisco, California, pursuant to, and in accordance with, said notice.

(7) During the course of said meeting certain claims were voted by Arthur P. Shapro, Esq., for John M. England, and certain other claims were voted by Kal W. Lines, on behalf of himself, and a recess thereafter was granted to permit the opposing candidates and/or their respective representatives to examine the claims for the purpose of satisfying themselves as to the validity of each of said sets of claims and to give the respective candi-

dates and/or their respective representatives opportunities, later, in open court, if they so chose to do, to object to the voting of any of such claims.

After the court had reconvened for the purpose of hearing any objections on the part, or in behalf of, any of the contesting parties, and to determine who should be selected as trustee, certain evidence, oral and documentary, was offered and received and, the matter having been submitted for decision, the court, now being advised fully in the premises, so far as the record in the aforesaid bankruptcy proceeding discloses, finds:

(1) That at the time said Walter J. Hempy was named in the aforesaid assignment for benefit of creditors as the assignee, said Walter J. Hempy, then was, ever since has been, and now is, the secretary of the Board of Trade of San Francisco.

(2) That, at the time of the filing of the initial petition in bankruptcy in the above-entitled court there was in the hands of Walter J. Hempy, as the assignee named in said assignment and/or in the office, or a bank account under the control of said Board of Trade, the sum of $4,054.88 (according to the verified Statement of Affairs of Alfonso Paul Sanfilippo, the now bankrupt herein).

(3) That an exact photostatic copy of the letter hereinabove referred to is as follows:

BOARD OF TRADE OF SAN FRANCISCO

ORGANIZED 1877
AN ASSOCIATION OF WHOLESALERS, MANUFACTURERS AND DISTRIBUTORS OF NORTHERN AND CENTRAL CALIFORNIA

BOARD OF TRADE BUILDING
444 MARKET STREET

SAN FRANCISCO 11, CALIF.

April 23 1954

RE: Alfonso Paul Sanfillippo
STAG LIQUORS
6273 3rd St., San Francisco

TO THE CREDITORS:

The above party has filed a bankruptcy petition, and all creditors are now required to file proofs of their claims with the Referee in Bankruptcy.

The undersigned Committee, appointed at the general meeting of creditors held at the Board last December, desires your cooperation in the selection of a competent trustee at the first meeting of creditors, and there is enclosed appropriate form of proof and letter of attorney with instructions attached.

It is essential that itemized invoices, as well as an itemized statement, be annexed to the proof and that the executing party personally appear before the Notary Public.

The undersigned Committee has designated the law firm of Shapro & Rothschild to represent it in the bankruptcy proceedings and you will note that their names appear in the within letter of attorney.

Please give the enclosure prompt attention and return it to the undersigned Committee in care of the Board of Trade.

Yours very truly,

CREDITORS' COMMITTEE
composed of
FLASTAFF BREWING CORP.
A. K. THANOS CO.
RATHJEN BROTHERS, INC.
MAX SOBEL WHOLESALE LIQUORS
HAAS BROTHERS

Encl.
53-1664

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(4) That each member of the aforesaid Creditors' Committee, at the time said letter was prepared and sent to creditors, as aforesaid, was a member of the aforesaid Board of Trade.

(5) That all the activities of the membership of said Creditors' Committee, in connection with the aforesaid assignment and the aforesaid affairs and/or property of said Alfonso Paul Sanfilippo, after the making, by said Alfonso Paul Sanfilippo, of the aforesaid assignment, were as members of said Board of Trade and not merely as creditors of said Alfonso Paul Sanfilippo.

(6) That there were nineteen (19) claims voted by Arthur P. Shapro, Esq., aggregating the sum of $4,314.82, which were objected to by or on behalf of Kal W. Lines and the creditors represented by him, each of which had been "filled out" on a claim form used by said Board of Trade and which, as originally printed, had the following wording, at the top thereof:

> "Under within Letter of Attorney, all dividends should be forwarded to James M. Conners, 444 Market Street, San Francisco, Calif., Attorney for Claimant";

that the aforesaid quoted language had been obliterated by the use of numerous typed letter "exes" and in the place of said obliterated words, the following wording was substituted in typewriting at the top of said claim forms:

"Under within Letter of Attorney, all divi-

dends should be forwarded to Shapro & Rothschild, 155 Montgomery Street, San Francisco, California, Attorneys for Claimant."

(7) That from each of the last mentioned nineteen (19) claims (which as originally had printed, on each of the forms especially used by the Board of Trade and/or its members in the solicitation of claims to be voted for trustees in bankruptcy, and for other purposes, the following language appeared, "Claimant authorizes James M. Conners and/or Vernon D. Stokes * * * or either of them, with full power of substitution, to attend all meetings of creditors of the bankrupt aforesaid * * * and in his or its name * * * to vote for a trustee, or trustees * * *,") had been stricken the last above quoted language, by the use of a heavy black, obliterating line, the words "James M. Conners and/or Vernon D. Stokes" and in their stead had been typed the words "and/or Shapro & Rothschild."

(8) That Walter J. Hempy, named in the aforesaid assignment for the benefit of creditors in all his activities in connection with the aforesaid affairs and property of said Alfonso Paul Sanfilippo were performed, not as an assignee on his own behalf, but as the Secretary of said Board of Trade and in truth and in fact acting, in said assignment, wherein he was named assignee, for and/or on behalf of said Board of Trade and/or the membership of said Board of Trade, and not otherwise.

(9) That in causing to be prepared and sent out the aforesaid letter and each of the aforesaid nine-

teen (19) claims, in the manner and under the circumstances aforesaid, it was the intent, on the part of said Creditors' Committee, acting for said Board of Trade, indirectly to keep, if posible, some sort of control over the assets of the estate of the above-named bankrupt, at least to the extent of such assets as were in the hands of Walter J. Hempy and/or said Board of Trade.

(10) That, in the light of all the circumstances, it would not be, nor is it, for the best interest of all the creditors of Alfonso Paul Sanfilippo, and particularly the creditors who, or which, are not members of said Board of Trade to count the claims procured in the maner, and under the circumstances aforesaid, in voting for any candidate for trustee in the above-entitled manner.

(11) That John M. England has but one (1) claim, in the sum of $193.88, favoring him as trustee, to which no valid objection has been made.

(12) That Kal W. Lines, so far as number was, and is, concerned herein, has three (3) claims aggregating the sum of $375.65, favoring him, as trustee herein, to which no valid objection has been made, and that none of such claims is that of any member of said Board of Trade.

(13) That Kal W. Lines, so far as amount was, and is concerned herein, has five (5) claims (including the three (3) last mentioned claims) in the total sum of $407.21, favoring him, as trustee herein, to

which no valid objection has been made, and that none of said claims is that of any member of said Board of Trade.

(14) That nothing herein contained is intended to be construed, nor is it, any reflection whatsoever, on said John M. England to act as a trustee in bankruptcy.

Because of the state of the record herein and, in the light of all the circumstances shown by said record, the court concludes:

(1) That Kal W. Lines has a majority, both in number and in amount of the claims of creditors which are entitled to be counted herein to be voted for trustee.

(2) That, to allow any of the aforesaid nineteen (19) claims to be voted for any candidate for the herein trusteeship would be for the court to act contrary to the dictates of sound judicial discretion and also contrary to good practice in the bankruptcy court of this jurisdiction.

(3) That, the "offers to prove" made by counsel designated in the aforesaid letter to represent the aforesaid Creditors' Committee should be denied and the objections made by the representative of Kal W. Lines, to each of the aforesaid nineteen (19) claims, so far as voting purposes are concerned herein, should be sustained.

(4) That Kal W. Lines alone should be appointed trustee in bankruptcy of the bankruptcy

estate of the above-named bankrupt, not to qualify as such, however, until a bond has been fixed and approved by the court, counsel designated in said letter to have not to exceed five (5) days from date hereof within which to suggest to the court what the amount of such bond should be.

It, Therefore, Hereby Is Ordered:

(1) That the "offers to prove" made by counsel designated in the aforesaid letter to represent the aforesaid Creditors' Committee be, and said "offers to prove" are, and each one thereof is, Denied and the objections made by the representative of Kal W. Lines, to each of the aforesaid nineteen (19) claims, so far as voting purposes are concerned herein, are, and each one of said objections is, Sustained, and

(2) That Kal W. Lines alone be, and he is, appointed trustee in bankruptcy of the bankruptcy estate of the above-named bankrupt, not to qualify as such, however, until a bond has been fixed and approved by the court, counsel designated in said letter to have not to exceed five (5) days from date hereof within which to suggest to the court what the amount of such bond should be.

Dated: May 26, 1954.

/s/ BURTON J. WYMAN,
Referee in Bankruptcy.

Referee's Notes

Because the following excerpts from some of the numerous decisions (examined by the undersigned referee in bankruptcy in dealing with the situation presented) may be of aid to your Honor in considering and determining the question raised by the aforesaid petition for review, they are included in this certificate and report without any comment:

"The theory of the bankrupt law is that the assets of a bankrupt shall be honestly collected and honestly disbursed among all the creditors. Neither the bankrupt himself, nor his attorney, nor an assignee, nor his attorney, can be permitted to control the selection of a trustee. If creditors knowingly join with the bankrupt or his attorney, or with an assignee or his attorney, in an effort to do what it repeatedly has been decided they may not do, the simplest and most obvious way to defeat their purpose is to reject their selection of trustee, and permit the creditors who are not in the combination to make the selection."

In re Stowe
(D.C., N.D., Calif.) 235 F. 463, 464 (Opinion by Dooling, District Judge).

"The trustee represents every creditor,"

In re Lewensohn
(C.C.A. 2) 121 F. 538, 539, "not a majority, however great."

In re Columbia Iron Works
(D.C., Mich.) 142 F. 234, 237.

"There is nothing in the Bankruptcy Act making the selection of a trustee by the creditors absolute at all events."

In re Austin Resort & Land Co.
(D.C., N.D., Calif.) 12 F. Supp. 459, 462
(Opinion by St. Sure, District Judge.)

"The referee is vested with authority by the act to preside over the election of a trustee and to say what creditors have the right to vote. It would be useless for him to do so if he lacked the further authority to set aside a result inimical to the best interest of all the creditors and contrary to the general principles underlying the orderly administration of the bankruptcy law."

In re Leader Mercantile Co.
(C.C.A. 5) 36 F. (2d) 745, 746.

"As stated In Matter of Rosenfeld-Goldman, D.C. 228 F. 921, at page 923:

> "'The actual administration of bankrupt estates is, under the present law, left largely to the Referees. It is the settled practice of this court not to disturb their acts in administrative matters—of which the election of a trustee is a typical example—unless a plain and injurious error of law or abuse of discretion is shown (Emphasis supplied). See also Sloan's Furriers, Inc., v. Bradley, 6 Cir., 146 F. 2d 757.'

"Therefore, unless the allowance or disallowance of a claim was so plainly wrong, that an election

based on the Referee's decision was manifestly unfair, his decision must stand."

In re Deena Woolen Mills
(D.C., Me.) 114 F. Supp. 260, 267, 268.

"* * * it is the settled practice of this court not to disturb the acts of the referee 'in administrative matters—of which the election of a trustee is a typical example—unless a plain and injurious error of law or abuse of discretion is shown."

In re Austin Resort & Land Co., supra, p. 462.

"It is held that the action of the referee in bankruptcy in administrative matters is entitled to great weight. See in re Jaffee (D.C.) 272 F. 899; In re Wink (D.C.) 206 F. 348.

"The discretion exercised by the referee in such circumstances should not be lightly overruled."

In re Scott
(D.C., Mich.) 53 F. (2d) 89, 92.

"The term 'discretion' denotes the absence of a hard and fast rule. The Styria v. Morgan, 186 U.S. 1, 9. When invoked as a guide to judicial action it means a sound discretion, that is to say, a discretion exercised not arbitrarily or wilfully, but with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result."

Langnes v. Green
282 U. S. 531, 541, 51 S. Ct. 243, 247, 75 L. Ed. 520, 526.

"* * * the Referee has discretion as to how much argument or testimony he will hear in support or opposition to a claim before election."

> In re West Hills Memorial Park
> (D.C., Ore.) 41 F. Supp. 169, 170 (Opinion by Fee, then District Judge, now Circuit Judge).

"Discretion," as defined in Delno v. Market St. Ry. Co. (C.C.A. 9) 124 F. (2d) 965, 967:

> " 'The power exercised by courts to determine questions to which no strict rule of law is applicable but which, from their nature, and the circumstances of the case, are controlled by the personal judgment of the court.' 1 Bouv. Law Dict., Rawles' Third Revision, p. 884. Judicial action—discretionary in that sense—is said to be final and cannot be set aside on appeal* except when there is an abuse of discretion * * *. Discretion, in this sense, is abused when the judicial action is arbitrary, fanciful or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial

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*"In passing upon a petition for review of a referee's order, 'The proceeding is in substance an appeal from the court of bankruptcy—i.e., the referee—to the District Court.' In re Pearlman (C.C.A.) 16 F. (2d) 20, 21."

> In re Big Blue Min. Co.
> (D.C., N.D., Calif.) 16 F. Supp. 50, 51 (Opinion by St. Sure, District Judge).

court. If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion."

See, also, In re Maine State Raceways (D.C., Me.) 105 F. Supp. 620, 628.

Papers Handed Up Herewith

Handed up herewith, as parts of this certificate and report, are the following papers:

1. Petition for Review;
2. Summary of Record, Findings of Fact, etc.;
3. Reporter's Transcript; and
4. Envelope containing the aforesaid Nineteen (19) claims and Form Letter.

Dated: July 22, 1954.

Respectfully submitted,

/s/ BURTON J. WYMAN,
Referee in Bankruptcy.

[Endorsed]: Filed May 26, 1954, Referee.

[Endorsed]: Filed July 22, 1954, U.S.D.C.

[Title of District Court and Cause.]

PETITION FOR REVIEW

Come now the following creditors of the above estate, viz:

Falstaff Brewing Corp.,
Goebel Brewing Company of California,
Monteverde & Parodi, Inc.,
Ralph Montali, Inc.,
Pacific Gas & Electric Company,
Pabst Brewing Company,
Harry F. Rathjen Co.,
San Francisco Brewing Corporation,
Melvin Sosnick Company,
Twin Peaks Distributing Co.,
Vick's Distributing Company,
N. Cervelli & Company,
California Wine Association,
Brown & Bigelow,
Carlo Arbasetti,
The Albert Peters Co.,

and respectfully represent:

That heretofore and on the 26th day of May, 1954, Honorable Burton J. Wyman, Referee in Bankruptcy herein, made and entered herein that certain "Summary of Record, Findings of Fact and Conclusions of Law Relative to Contest over Election of Bankruptcy Trustee" and Orders thereon, a full, true and correct copy of which is hereto annexed, marked "Exhibit 'A,'" and hereby expressly re-

fered to and made part hereof; that the aforesaid Referee's orders so made and entered herein on the said 26th day of May, 1954, were and are erroneous and contrary to law in each and all of the following particulars:

(1) That neither said Referee's orders nor his Findings and/or Conclusions therein contained are supported by, and that said Referee's orders, Findings and/or Conclusions therein contained are contrary to the records, papers and files herein.

(2) That of the said Findings of Fact made by said Referee, those numbered (5) and (8) are wholly unsupported by the evidence adduced before said Referee and are contrary to the evidence sought to be introduced by and offered by your Petitioners in support of John M. England, the candidate of your Petitioners for election as Trustee of the above estate, and said evidence was refused by said Referee in Bankruptcy.

(3) That of the said purported Findings of Fact made by said Referee, those numbered (9) and (10) are, in effect, conclusions of the said Referee and not findings of fact and, in any event, are not supported by the evidence received by said Referee in Bankruptcy upon the issues involved herein and are contrary to the evidence sought to be introduced by and offered by your Petitioners in support of J. M. England, the candidate of your Petitioners for election as Trustee of the above estate, and said evidence was refused by said Referee in Bankruptcy.

(4) That the Conclusions of Law made by said Referee and numbered (1), (2), (3) and (4) are, and each of them is, contrary to law, is unsupported by valid findings of fact and/or is unsupported by the records, papers and files herein.

(5) That said Referee in Bankruptcy improperly refused to accept evidence offered by your Petitioners and/or contained in the offer of proof made by your Petitioners in support of their said voting of said claims for said Trustee and improperly sustained objections thereto, notwithstanding the fact that the grounds of said objections were and are untenable in law and not based upon any competent evidence adduced by said Objectors and contained in the records of this proceeding.

(6) That by reason of the aforesaid rulings and/or orders of said Referee in Bankruptcy your Petitioners were disenfranchised and were not permitted to vote for the candidate of their selection as Trustee of the estate of the above-named Bankrupt notwithstanding the fact that it was conceded by the Objectors to the voting of the said claims of your Petitioners as aforesaid, that if the election of your Petitioners' said candidate, John M. England, as such Trustee, were to be approved by this Court that said John M. England would administer said estate impartially, fairly, and accurately (See Reporter's Transcript of hearing, May 20, 1954, page 8, lines 5-13); and notwithstanding the fact that there was no showing made in support of the said objections interposed to the voting of your Petitioners' said

claims for said Trustee; that said Petitioners, or any of them, or their attorney in fact had any interest or was likely to have an interest adverse to the said bankrupt estate and/or of any of the creditors thereof.

(7) That it affirmatively appears from the evidence received by said Referee in Bankruptcy and from the evidence offered by your Petitioners and improperly, as aforesaid, rejected by said Referee in Bankruptcy that contrary to said Referee's purported Finding No. (9), it was not the intent of, nor was any effort whatever made by or on the part of the said Creditors Committee, acting for said Board of Trade, indirectly or otherwise to keep, if possible, some or any sort of control over the assets of the estate of the above-named Bankrupt to the extent of said purported Finding No. (9) set forth to any extent or at all; and that it affirmatively appears therefrom that the selection of the nominee for Trustee of the estate voted for by your Petitioners, including the members of said Creditors Committee and other members of the Board of Trade and other non-members of the Board of Trade was made solely by your Petitioners' attorney in fact, Arthur P. Shapro, Esq., without prior consultation with or instructions or advice from said Creditors Committee, the said Board of Trade, or any member, officer or employee thereof.

Wherefore, your Petitioners pray that the aforesaid Referee's orders made and entered herein on the said 26th day of May, 1954 (a true copy of which

is hereto annexed as "Exhibit A" hereof), may be, by the Judge of the above-entitled Court, reviewed and reversed; and that said Referee in Bankruptcy be by the said Judge directed to overrule the objections to and to admit and receive the evidence offered by your Petitioners in support of the votability of their said claims, and in the absence of contrary proof thereon directing said Referee to approve the election of said John M. England as Trustee of the above estate in lieu and instead of Cal W. Lines, all after due proceedings to be had herein in accordance with Section 39(c) of the Bankruptcy Act; or for such other, further and different order or relief as to this Honorable Court may seem just in the premises.

FALSTAFF BREWING CORP.,
GOEBEL BREWING
COMPANY OF CALIFORNIA,
MONTEVERDE & PARODI,
INC.,
RALPH MONTALI, INC.,
PACIFIC GAS & ELECTRIC
COMPANY,
PABST BREWING COMPANY,
HARRY F. RATHJEN CO.,
SAN FRANCISCO BREWING
CORPORATION,
MELVIN SOSNICK
COMPANY,
TWIN PEAKS
DISTRIBUTING CO.,

VICK'S DISTRIBUTING COMPANY,
N. CERVELLI & COMPANY,
CALIFORNIA WINE ASSOCIATION,
BROWN & BIGELOW,
CARLO ARBASETTI,
THE ALBERT PETERS CO.,
Petitioners.

By /s/ ARTHUR P. SHAPRO,
Their Attorney-in-Fact.

United States of America,
Northern District of California,
City and County of San Francisco—ss.

Arthur P. Shapro, being first duly sworn, deposes and says:

That he is one of the attorneys for the Petitioners named herein, and as such is duly authorized to and does make this verification on behalf of said Petitioners; that he has read said Petition, knows the contents thereof, and hereby makes solemn oath that the statements therein contained are true, according to the best of his knowledge, information and belief.

/s/ ARTHUR P. SHAPRO.

Subscribed and sworn to before me this 7th day of June, 1954.

[Seal] /s/ FRANCES R. WIENER,
Notary Public in and for the City of County of San Francisco, State of California.

[Exhibit A attached is identical to Exhibit A attached to the Certificate and Report of Referee.]

Receipt of Copy acknowledged.

[Endorsed]: Filed June 7, 1954, Referee.

[Endorsed]: Filed July 22, 1954, U.S.D.C.

Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE PETITION FOR REVIEW

Good cause appearing therefor, now on motion of Messrs. Shapro & Rothschild, attorneys for certain creditors herein,

It Is Hereby Ordered that the creditors whose claims were disallowed for voting purposes by the orders of the undersigned Referee in Bankruptcy herein made on May 26, 1954, and each of them, may have to and including the 7th day of June, 1954, within which to file herein their Petition for review of said last-mentioned Orders.

Dated at San Francisco in Said District this 4th day of June, 1954.

/s/ BURTON J. WYMAN,
Referee in Bankruptcy.

[Endorsed]: Filed June 4, 1954, Referee.

[Endorsed]: Filed July 18, 1955, U.S.D.C.

[Title of District Court and Cause.]

ORDER STAYING ADMINISTRATION PENDING REVIEW

Certain of the creditors of the above-named Bankrupt having this day filed herein their Petition for Review of those certain orders made and entered herein by the undersigned Referee in Bankruptcy on the 26th day of May, 1954, and their motion to that effect having heretofore been made in open Court on behalf of said Petitioners by Arthur P. Shapro, Esq., one of their attorneys, and having been granted by this Court conditional upon such filing, and good cause appearing therefor,

It Is Hereby Ordered that from and after his qualification as Trustee of the estate of the above-named Bankrupt, Kal W. Lines, the person appointed as such Trustee by the undersigned Referee in Bankruptcy by virtue of the orders hereinabove referred to, shall take no further steps or proceedings in the administration of said Bankrupt's estate pending the final determination of said Petition for

Review other than, if necessary, to file an inventory of the motor vehicles scheduled by said Bankrupt for the purpose of appraisal thereof; and

It Is Further Ordered that the premium payable on the bond of said Kal W. Lines as such Trustee shall be charged against and shall be paid by the estate of the above-named Bankrupt, regardless of any determination that may be made with respect to said Petition for Review of the undersigned's said orders dated the 26th day of May, 1954.

Dated at San Francisco in said District this 7th day of June, 1954.

/s/ BURTON J. WYMAN,
Referee in Bankruptcy.

[Endorsed]: Filed June 7, 1954, Referee.

[Endorsed]: Filed July 18, 1954, U.S.D.C.

[Title of District Court and Cause.]

AFFIDAVIT

State of California,
City and County of San Francisco—ss.

Henry Gross, being first duly sworn, deposes and says:

That he is one of the attorneys for the above-named bankrupt; that on or about the 15th day of April, 1954, your affiant was contacted by the above-named bankrupt relative to the advisability of filing

a voluntary petition in bankruptcy; that said bankrupt told your affiant that on the 17th day of December, 1953, he had made a general assignment of all of the assets of his business to the Board of Trade of San Francisco for the benefit of his creditors; that said assignee had liquidated said business and had in its possession as a result of said liquidation the sum of $4,054.88 for distribution to his creditors; that he had no desire to file a petition in bankruptcy if all of his creditors would accept a pro rata share of the money so held by the Board of Trade and release him from any further obligation;

That among the creditors of said bankrupt were Providenza and Venerando Sanfilippo, the mother and father of said bankrupt, who had a joint and several claim against him for money loaned in the amount of $13,824.33; that said bankrupt felt that his parents should share pro rata with his other creditors in any distribution of moneys by the Board of Trade; that after said conference between the bankrupt and your affiant and while the bankrupt was in his office, your affiant contacted William C. Drinnen, of the Board of Trade of San Francisco, in order to ascertain if the bankrupt would be granted a full release by his creditors without filing a voluntary petition in bankruptcy; however, your affiant was advised by the said William C. Drinnen that the creditors who were represented by the Board of Trade of San Francisco and/or who were members thereof, would not grant a full release to the bankrupt unless his parents waived their right

to participate in any dividend to be declared by the Board of Trade on the $4,054.88 held by it. That in an attempt to ascertain the reason why the said creditors would refuse to grant the bankrupt a release unless his parents would waive their right to participate in said dividend, your affiant asked the said William C. Drinnen if the creditors questioned the fact that the bankrupt's parents actually had loaned him the money; that in reply to said questioning the said William C. Drinnen told your affiant that there was no question but that they had loaned him money in the approximate sum of $15,000.00 to enable him to go into business, and that while the creditors felt that $13,824.33 was more than the bankrupt still owed his parents on said obligation, still the amount of said indebtedness was not less than within $1,000.00 of said amount; that your affiant was advised by Mr. Drinnen, however, that even if the amount of his parents' claim was agreed upon between the parents and the creditors, the creditors would still insist that they waive any right to participate in a dividend. That the said William C. Drinnen also advised your affiant that even if the bankrupt did not receive a release from his creditors, the Board of Trade, as assignee for creditors, would still refuse to pay a dividend to the parents of the bankrupt on their claim and would force them to file suit against the assignee for the payment of any dividend to which they might be entitled.

That your affiant then advised Mr. William C. Drinnen that if the creditors represented by the

Board of Trade were going to insist upon the preferential treatment of their claims over the recognized, legitimate claim of the bankrupt's parents, your affiant would have to advise the said Alfonso Paul Sanfilippo, the above-named bankrupt, to immediately file a voluntary petition in bankruptcy to prevent the Board of Trade, as assignee for the benefit of creditors, from paying certain creditors and refusing to pay other creditors although all creditors were of the same class, to wit, general unsecured creditors of the bankrupt.

In accordance therewith, a voluntary petition in bankruptcy was filed in the above-entitled matter on the 16th day of April, 1954, just one day preceding four months after the bankrupt had made the assignment for the benefit of creditors to the Board of Trade of San Francisco.

/s/ HENRY GROSS.

Subscribed and sworn to before me this 4th day of October, 1954.

[Seal] /s/ ADA V. PENNINGTON,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed October 11, 1954.

Title of District Court and Cause.]

AFFIDAVIT

Arthur P. Shapro, being first duly sworn, deposes and says:

That he is an Attorney at Law, duly licensed, ever since October, 1927, to practice in, and practicing in, the above-entitled court;

That on the 28th day of January, 1930, Affiant appeared before the Honorable Burton J. Wyman, Referee in Bankruptcy of the above-entitled Court, then sitting at Oakland, California, in the Matter of Max Belling, an individual doing business as "Belling's Furniture House," No. 18765-S in the above-entitled Court, on behalf of California Cotton Mills, Chas. F. Braun Mattress Co., and Dieringer Bros. Furniture Mfg. Co., the Petitioning Creditors in said Involuntary Bankruptcy Proceedings; that then and there, on their behalf, Affiant objected to the voting, by Clarence A. Shuey, Esq., (the Attorney-in-Fact named in the proofs of claim and letters of attorney of a large number of creditors of said Bankrupt) upon the grounds that said claims and letters of attorney had been solicited by the Creditors' Committee at the Board of Trade of San Francisco by circular letters on the letterhead of the said Board of Trade of San Francisco, dictated for said Creditors' Committee by George W. Brainard, the then Secretary of the Board of Trade of San Francisco, and that said George W. Brainard had been the Assignee for the benefit of creditors of said Max

Belling, an individual doing business as "Belling's Furniture House," and would have to account to the Trustee herein;

That when asked by said Referee Wyman whether or not Affiant contended that, if elected, W. E. Dean, the candidate for Trustee nominated by said Shuey, would administer said bankrupt estate other than impartially, fairly and accurately, Affiant responded "No"; that said Referee Wyman then and there stated that on the basis of such concession by Affiant, Mr. Dean, the candidate of the creditors whose claims had been so solicited through the offices of the Board of Trade of San Francisco, would not have any interest adverse to the Bankrupt's estate, and said Referee Wyman thereupon overruled Affiant's objections to the voting of said claims and approved the election of said W. E. Dean as Trustee of said Max Belling, an individual doing business as "Belling's Furniture House," Bankrupt;

That to the knowledge of Affiant, the records of said Referee Wyman in said Belling case originally contained the full transcript of all the proceedings therein, but that, in accordance with custom, the Clerk of the above-entitled Court, after the lapse of approximately ten years following the closing of said Max Belling estate, cause to be destroyed all of the records of said case other than those now remaining therein in the Office of said Clerk;

That the foregoing was dictated by Affiant from personal notes made by Affiant at the time of the hearing above mentioned on the 28th day of Janu-

ary, 1930, which said notes are still in the possession of said Affiant.

/s/ ARTHUR P. SHAPRO,
Affiant.

Subscribed and sworn to before me this 22nd day of October, 1954.

[Seal] /s/ FRANCES R. WIENER,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed October 25, 1954.

[Title of District Court and Cause.]

AFFIDAVIT

William C. Drinnen, being first duly sworn, deposes and says:

That he is, and at all times hereinafter mentioned was, an Assistant Secretary of the Board of Trade of San Francisco;

That he has read the affidavit of Henry Gross, dated October 4, 1954, attached to the Brief herein filed on October 11, 1954, on behalf of Kal W. Lines, Trustee;

That the only discussion had between Affiant and said Henry Gross concerning litigation against the Assignee concerning the payment of any dividend to Providenza Sanfilippo and Venerando Sanfilippo,

the mother and father of said Bankrupt, to which they might be entitled from the proceeds of said Assignee's liquidation of the assets of the above-named Bankrupt, was to the effect that, and Affiant then told said Henry Gross, the only purpose of requiring litigation thereover, on behalf of the Assignee, was in order to have a Court establish not only the amount, but also the legitimacy of the claims of said parents against said Bankrupt, without which the other general creditors would not be satisfied to permit a pro-rata distribution to said parents on their said alleged claim against said Bankrupt.

/s/ WILLIAM C. DRINNEN,
Affiant.

Subscribed and sworn to before me this 22nd day of October, 1954.

[Seal] /s/ C. J. DORAN,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed October 25, 1954.

[Title of District Court and Cause.]

AFFIDAVIT

Ben Singer, being first duly sworn, deposes and says:

That he is now, and was at the times hereinafter mentioned, employed by James M. Conners, the

Attorney for the Board of Trade of San Francisco at its office in the City and County of San Francisco;

That at the direction of the Creditors' Committee in the above matter composed of Falstaff Brewing Corporation, A. K. Thanos Co., Rathjen Bros., Inc., Max Sobel Wholesale Liquors, and Haas Brothers, Affiant dictated and caused to be transmitted in the mail to the known creditors of the above-entitled Bankrupt the circular letter dated April 23, 1954, which is "Joint Exhibit No. 1" in the above-entitled matter, and caused to be enclosed in each envelope so addressed to said creditors with a copy of said circular letter, a form of proof of claim and letter of attorney in which, at the time of their transmission to said creditors with said letter, the names of "James M. Conners and/or Vernon D. Stokes" had been stricken out and the type "and/or Shapro & Rothschild" had been inserted therein; that likewise at the time said forms of proofs of claim and letters of attorney were transmitted to said creditors, together with the letter of April 23, 1954, the name and address of James M. Conners, 444 Market St., San Francisco, California, as the Attorney for the creditors, had, on the face of the proof of claim, been stricken and the firm name of Shapro & Rothschild, 155 Montgomery Street, San Francisco, California, typed therein in lieu thereof;

That the insertion of the words "and/or" in type preceding the firm name of Shapro & Rothschild in said letters of attorney was inadvertent and was not designed to permit the insertion of any name in

front thereof, nor were said words inserted therein prior to the cancellation of the names of Conners and Stokes therefrom;

That, to the personal knowledge of Affiant, no changes or additions in any form were made on the proofs of claim filed herein on said forms and voted by Arthur P. Shapro, Esq., by or with the knowledge of said James M. Conners and/or the Board of Trade of San Francisco after said proofs of claim, executed by said creditors, were returned to and received in the office of said Board of Trade of San Francisco;

That the substitution of the name "Shapro & Rothschild" for the names of James M. Conners and/or Vernon D. Stokes in the said Letter of Attorney before the transmission of the forms to said creditors was caused to be made by said Affiant at the instruction of said Creditors' Committee.

/s/ BEN SINGER,
Affiant.

Subscribed and sworn to before me this 22nd day of October, 1954.

[Seal] /s/ JEAN GRANT,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed October 25, 1954.

[Title of District Court and Cause.]

MEMORANDUM AND ORDER

The matter before this Court is a petition for review of an order of a referee in bankruptcy. The order in question appointed a trustee in bankruptcy after an election contest. Petitioners are creditors whose claims were disqualified by the referee from being voted in the election contest.

Before the bankrupt filed his voluntary petition in bankruptcy, he made a general assignment for the benefit of creditors, naming Walter J. Hempy, who is the Secretary of the Board of Trade of San Francisco, as assignee. At a general meeting of creditors a creditors' committee was appointed, and all of the members of the committee were members of the Board of Trade.

After the bankrupt filed a voluntary petition in bankruptcy, the creditors' committee sent a form letter (on stationery of the Board of Trade) to the creditors, soliciting their proofs of claim. At the first meeting of creditors before the referee in bankruptcy a contest took place over the election of a trustee. The referee sustained objections to the claims of petitioners that were obtained through the activity of the creditors' committee. Petitioners represent the overwhelming majority of the bankrupt's creditors both in number and in the aggregate amount of their claims. The minority creditors admit, and the referee specifically found, that petitioners' nominee for trustee is in all respects quali-

fied to act in that capacity and would administer the bankrupt estate impartially, fairly and accurately. It is further conceded that petitioners' nominee for trustee is not connected or associated with the Board of Trade, or with the named assignee.

The basis on which the referee disqualified the claims solicited by petitioners is the referee's finding that in soliciting those claims "* * * it was the intent, on the part of said Creditors' Committee, acting for said Board of Trade, indirectly to keep, if possible, some sort of control over the assets of the estate of the above-named bankrupt * * *"

At the outset this Court takes note of the weight to be given findings of the referee in bankruptcy. The rule in this Circuit is that the findings of the referee should not be set aside unless clearly erroneous. This rule received its most recent statement in the case of Earhart v. Callan, 9th Cir., March 10, 1955, in which the court said:

> "[The General Orders in Bankruptcy] require the District Court to accept the referee's findings unless clearly erroneous. Humphrey v. Hart, 1946, 9 Cir., 157 F. 2d 844; in re Skrentny, 1952, 7 Cir., 199 F. 2d 488, 492."

In the case of Humphrey v. Hart, 9th Cir., 157 F. 2d 844, 846, the court put it this way:

> "If the master's findings were clearly erroneous, the court should have rejected them and should have made findings of its own. If not

clearly erroneous, the master's findings should have been accepted as correct."

A helpful statement is also found in the case of In re Josephson, 1st Cir., 218 F. 2d 174, 182:

> "'Abuse of discretion' is a phrase which sounds worse than it really is. All it need mean is that, when judicial action is taken in a discretionary matter, such action cannot be set aside by a reviewing court unless it has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors."

The rule stems from General Order in Bankruptcy 47:

> "Unless otherwise directed in the order of reference the report of a referee or of a special master shall set forth his findings of fact and conclusions of law, and the judge shall accept his findings of fact unless clearly erroneous."

Petitioners have advanced the argument that since General Order in Bankruptcy No. 13 was abrogated in 1939, a referee does not have the power to disapprove the election of a trustee. General Order No. 13 provided:

> "The appointment of a trustee by the creditors shall be subject to be approved or disapproved, and he shall be removable by the referee or by the judge."

But a similar provision is now found in Section 2(a)(17) of the Bankruptcy Act, which provides that the courts of bankruptcy are invested with the power to:

> "Approve the appointment of trustees by creditors or appoint trustees when creditors fail so to do * * *"

Therefore this Court does not hold that referees in bankruptcy have lost their supervisory power over the election of a trustee; but this Court will examine the proceedings before the referee to see if that power was exercised for good cause. In the case of In re Leader Mercantile Co., 5th Cir., 36 F. 2d 745, 746, the court referred to this supervisory power as follows:

> "Of course, this power is not to be used arbitrarily but only for good cause, in the exercise of sound judicial discretion."

In the case of In re Allied Owners' Corporation, E.D. N.Y. 4 F. Supp. 684, 687, the court said that this power should be exercised only in an emergency, and that "* * * the emergency must not be a trivial one. It should be of grave character and due weight * * *"

Conceding the power of a referee to disapprove the election of a trustee, this Court must examine the order of the referee to determine whether the power was exercised for good cause, or whether the order of the referee was clearly erroneous.

It is elementary that the theory of the Bankruptcy Act is to allow the creditors to select a trustee. This principle is well expressed in the case of In re Allied Owners' Corporation, E.D. N.Y., 4 F. Supp. 684, 687:

> "The purpose of the Bankruptcy Act is to permit creditors to direct and supervise the liquidation of a bankrupt estate. The estate belongs to them. * * * It cannot be denied that the vital interest which creditors have in the preservation and wise management of the estate of a bankrupt must as a general rule make for the best judges of who shall be appointed as trustee and their selection cannot be arbitrarily ignored."

This principle is carried into the Bankruptcy Act in 11 U.S.C.A. §72, which provides in part:

> "(a) The creditors of a bankrupt, exclusive of the bankrupt's relatives or, where the bankrupt is a corporation, exclusive of its stockholders or members, its officers, and the members of its board of directors or trustees, or of other similar controlling bodies, shall * * * appoint a trustee * * *"

Petitioners are not within any of the classes of creditors that are excluded by Section 72 from taking part in the selection of a trustee. In view of this fact, and in view of the fact that petitioners' nominee for trustee is conceded to be competent, fair and impartial, there must be the most com-

pelling reasons for disenfranchising the great majority of the creditors in favor of a small minority of them. The reason given by the referee is that petitioners' votes represented an attempt by petitioners to retain "some sort of control" over the bankrupt estate for the benefit of the Board of Trade. This finding is based primarily on the following facts: the creditors' committee was composed of members of the Board of Trade; the committee used the facilities of the Board of Trade to solicit proofs of claims; and if the petitioners are allowed to vote all of the claims they hold, they will control the selection of the trustee. From these facts the referee attempts to torture some adverse or conflicting interest or prejudicial association, which would disenfranchise any offending creditors, even though the trustee proposed by such creditors is under no such alleged disability except through the creditors who propose him. Such an interpretation would frustrate the purpose behind the provisions of the Bankruptcy Act authorizing the election of the trustee by creditors. Any creditor who had made an assignment for the benefit of creditors before bankruptcy would be automatically disqualified. It commonly occurs that creditors who agree on the selection of a creditors' committee will agree on a candidate for the trustee in bankruptcy, and the mere fact that these same creditors are members of a trade association should not, without more, operate to disqualify the votes of the great majority of creditors.

No exact precedent has been cited for the action here taken by the referee. A case which comes closest to resembling the facts of the case at bar is In re Stowe, N.D. Calif., 235 Fed. 463; but there the court said at page 464:

> "If creditors knowingly join with the bankrupt or his attorney, or with an assignee or his attorney, * * * the simplest and most obvious way to defeat their purpose is to reject their selection of a trustee * * *"

Clearly the petitioners did not join with the bankrupt or his attorney, or with the assignee or his attorney, and therefore the Stowe case does not sustain the action of the referee here. Other cases of disqualification for some sort of association or relationship with the bankrupt are not in point here.

It is the opinion of this Court that no sufficient showing has been made of a basis for disqualifying the claims solicited by petitioners, and in the absence of compelling reasons for disenfranchising the great majority of the creditors, it is a clear error to do so.

Counsel for petitioners shall prepare and present findings, conclusions and an order in accordance herewith.

Dated: March 31, 1955.

/s/ OLIVER J. CARTER,
United States District Judge.

[Endorsed]: Filed April 1, 1955.

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE PROPOSED AMENDMENTS TO FINDINGS OF FACT AND CONCLUSIONS OF LAW UNDER RULE 5(e) OF THE RULES OF PRACTICE OF THE ABOVE-ENTITLED COURT

Upon motion of Max H. Margolis made this day before the above-entitled Court, and good cause appearing therefor,

It Is Hereby Ordered that the time for the filing of proposed amendments to the findings of fact and conclusions of law heretofore lodged with the Clerk of the above-entitled Court on April 20, 1955, be, and the same is, hereby extended to and including May 4, 1955.

Dated: San Francisco, in said district; April 22, 1955.

/s/ OLIVER J. CARTER,
United States District Judge.

[Endorsed]: Filed April 22, 1955.

[Title of District Court and Cause.]

PROPOSED AMENDED FINDINGS, CONCLUSIONS OF LAW AND ORDER

The Petition for Review filed herein on June 7, 1954, seeking a review and an order reversing the order made and entered on May 26, 1954, by the

Honorable Burton J. Wyman, one of the Referees in Bankruptcy of the above-entitled Court, before whom the above-entitled proceedings have been, and now are pending, wherein one Kal W. Lines was appointed Trustee of the estate of the above-named bankrupt, together with said Referee's Certificate of Record, Findings of Fact and Conclusions of Law Relative to Contest Over Election of Bankruptcy Trustee, pursuant to the provisions of Section 39(c) of the Bankruptcy Act and the provisions of Rule 9 of the Rules of this Court, the petitioners being represented by Messrs. Shapro & Rothschild and respondent Kal W. Lines represented by Max H. Margolis, Esq., briefs having been submitted to the Court, and upon all of the records, papers, documents and files in said above-entitled proceeding this Court makes the following findings:

(1) On December 17, 1953, the above-named Alfonso Paul San Filippo made a general assignment for the benefit of his creditors in which said assignment one Walter J. Hempy was named as the assignee.

(2) Thereafter certain action was and/or certain actions were taken by and/or through said Walter J. Hempy characterized as aforesaid, with reference and/or relative to the affairs and/or property of said Alfonso Paul San Filippo at certain meetings held at the Board of Trade of San Francisco and at which said meetings certain members and/or employees of the Board of Trade were present and participated.

(3) On April 16, 1954, said Alfonso Paul San Filippo filed with the Clerk of the above-entitled Court his voluntary petition seeking to be adjudged a voluntary bankrupt.

(4) Thereafter, and on April 16, 1954, Alfonso Paul San Filippo was adjudged a bankrupt by the above-entitled Court, and the above-entitled bankruptcy proceedings were referred to the Honorable Burton J. Wyman, one of the Referees in Bankruptcy of said Court, to take such further proceedings therein as are required and permitted by the Bankruptcy Act.

(5) On or about April 23, 1954, a certain form letter was prepared and copies thereof mailed to bankrupt's creditors, the facilities of said Board of Trade and/or its membership being used in the preparation of said letter; that the members of the Creditors' Committee, at the time said letter was prepared and sent to the creditors were, and each, was a member of said Board of Trade.

(6) On May 20, 1954, the first meeting of creditors, after due notice to all interested parties had been given, was held before the said Referee in Bankruptcy at Room 609, Grant Building, 1095 Market Street, San Francisco, California, pursuant to and in accordance with said notice.

(7) During the course of said meeting, certain claims were voted by Arthur P. Shapro, Esq., for John M. England, and certain other claims were voted by Kal W. Lines, on behalf of himself.

(8) That, at the time said Walter J. Hempy was named in the aforesaid assignment for the benefit of creditors, as the assignee, said Walter J. Hempy then was, ever since has been, and now is, the Secretary of the Board of Trade of San Francisco.

(9) That, at the time of the filing of the petition in bankruptcy herein there was in the hands of Walter J. Hempy, as the assignee named in said assignment and/or in the office, or a bank account under the control of said Board of Trade the sum of $4,054.88.

(10) That all the activities of the membership of said Creditors' Committee, in connection with the aforesaid assignment and the aforesaid affairs and/or property of said Alfonso Paul San Filippo, after the making by him of the aforesaid assignment, were as members of said Board of Trade and not merely as creditors of said Alfonso Paul San Filippo.

(11) That there were nineteen (19) claims voted by Arthur P. Shapro, Esq., aggregating the sum of $4,314.82 which were objected to by, or on behalf of Kal W. Lines and the creditors represented by him, each of which had been "filled out" on a claim form used by said Board of Trade and which, as originally printed, had the following wording at the top thereof:

> "Under within Letter of Attorney, all dividends should be forwarded to James M. Con-

ners, 444 Market Street, San Francisco, Calif., Attorney for Claimant";

that the aforesaid quoted language had been obliterated by the use of numerous type letter "Exes" and in the place of said obliterated words, the following wording was substituted in typewriting at the top of each claim form:

"Under within Letter of Attorney, all dividends should be forwarded to Shapro & Rothschild, 155 Montgomery Street, San Francisco, California, Attorneys for Claimant."

(12) That from each of the last-mentioned nineteen (19) claims (which as originally had printed, on each of the forms especially used by the Board of Trade and/or its membership in the solicitation of claims to be voted for trustees in Bankruptcy, and for other purposes, the following language appeared, "Claimant authorizes James M. Conners and/or Vernon D. Stokes, * * * or either of them, with full power of substitution, to attend all meetings of creditors of the bankrupt aforesaid * * * and in his or its name * * * to vote for a trustee, or trustees * * *") had been stricken the last above-quoted language, by the use of a heavy black, obliterating line, the words "James M. Conners and/or Vernon D. Stokes" and in their stead had been typed the words "and/or Shapro & Rothschild."

(13) That Walter J. Hempy, named in said assignment for the benefit of creditors in all his activities in connection with the aforesaid affairs and property of said Alfonso Paul San Filippo were

performed not as an assignee on his own behalf, but as a Secretary of the Board of Trade and in truth and in fact acting, in said assignment, wherein he was named assignee for and on behalf of said Board of Trade and/or the membership of said Board of Trade, and not otherwise.

(14) That in causing to be prepared and sent out the aforesaid letter and each of the aforesaid nineteen (19) claims, in the manner and under the circumstances aforesaid, it was the intent, on the part of said Creditors' Committee, acting for said Board of Trade, indirectly to keep, if possible, some sort of control over the assets of the estate of the above-named bankrupt, at least to the extent of such assets as were in the hands of Walter J. Hempy and/or said Board of Trade.

(15) That in the light of all the circumstances, it would not be, nor is it, for the best interests of all the creditors of Alfonso Paul San Filippo, and particularly the creditors who, or which, are not members of said Board of Trade to count the claims procured in the manner, and under the circumstances aforesaid, in voting for any candidate for trustee in the above-entitled matter.

(16) That John M. England has but one (1) claim in the sum of $193.88, favoring him as trustee, to which no valid objection has been made.

(17) That Kal W. Lines, so far as number was, and is, concerned herein, has three (3) claims aggregating the sum of $375.65, favoring him, as trustee herein to which no valid objection has been

made, and that none of such claims is that of any member of said Board of Trade.

(18) That Kal W. Lines, so far as amount was, and is concerned herein, has five (5) claims (including the three last mentioned claims) in the total sum of $407.21, favoring him as trustee herein, to which no valid objection has been made, and that none of said claims is that of any member of said Board of Trade.

(19) That nothing herein contained is intended to be construed, nor is it, any reflection whatsoever on said John M. England to act as a trustee in Bankruptcy.

In accordance with all of the papers, files, documents and circumstances shown by the record herein, the Court concludes:

(1) That Kal W. Lines has a majority, both in number and in amount of claims of creditors which are entitled to be counted herein to be voted for trustee;

(2) That, to allow any of the aforesaid nineteen (19) claims to be voted for any candidate for the herein trusteeship would be for the Court to act contrary to the dictates of sound judicial discretion and also contrary to good practice in the Bankruptcy Court of this Jurisdiction;

(3) That, the "offers to prove," made by counsel designated in the aforesaid letter to represent the aforesaid Creditors' Committee should be, and is, denied, and the objections made by the representative of Kal W. Lines, to each of the aforesaid

nineteen (19) claims, so far as voting purposes are concerned herein, should be sustained:

(4) That Kal W. Lines alone should be appointed trustee in bankruptcy of the estate of the above-named bankrupt upon the filing of a bond in an amount to be fixed by this Court.

It, Therefore, Hereby Is Ordered:

That the order made, and entered herein on May 26, 1954, by the Referee before whom these proceedings have been, and now are, pending is adopted, confirmed and approved.

Dated: San Francisco, in said district;

May ...., 1955.

.....,
United States District Judge.

Receipt of Copy acknowledged.

Lodged May 3, 1955.

[Title of District Court and Cause.]

ORDER

It Is Ordered that this Court's Memorandum and Order dated March 31, 1955, in the above-entitled matter be amended as follows:

Strike the following sentence appearing on page five, lines 14, 15, and 16 of that Memorandum and Order:

"Any creditor who had made an assignment for the benefit of creditors before bankruptcy would be automatically disqualified."

And substitute in its place the following sentence:

"Any creditor for whose benefit an assignment had been made before bankruptcy would be automatically disqualified."

Dated: May 25, 1955.

/s/ OLIVER J. CARTER,
United States District Judge.

[Endorsed]: Filed May 25, 1955.

In the Southern Division of the United States District Court for the Northern District of California

No. 42878

In Bankruptcy

In the Matter of:

ALFONSO PAUL SAN FILIPPO,

Bankrupt.

ORDER REVERSING REFEREE'S ORDER APPOINTING KAL W. LINES TRUSTEE

The Petition for Review heretofore filed herein on the 7th day of June, 1954, by Falstaff Brewing Corp., Goebel Brewing Company of California,

Monteverde & Parodi, Inc., Ralph Montali, Inc., Pacific Gas & Electric Company, Pabst Brewing Company, Harry F. Rathjen Co., San Francisco Brewing Corporation, Melvin Sosnick Company, Twin Peaks Distributing Co., Vick's Distributing Company, N. Cervelli & Company, California Wine Association, Brown & Bigelow, Carlo Arbasetti, and The Albert Peters Co., praying for review and reversal of that certain Order made and entered herein on the 26th day of May, 1954, by Hon. Burton J. Wyman, Referee in Bankruptcy, herein and whereby one Kal W. Lines was appointed Trustee of the estate of the above-named Bankrupt, having regularly come on for hearing before the above-entitled Court, together with said Referee's Certificate and Report relative thereto, in accordance with the provisions of Section 39(c) of the Bankruptcy Act, said Petitioners being represented by Messrs. Shapro & Rothschild (Arthur P. Shapro, Esq., appearing), their attorneys, and said Kal W. Lines being represented by Max H. Margolis, Esq., his attorney, and the matter having been argued by counsel for the respective parties upon briefs submitted to the Court and upon all of the other records, papers and files herein, and the Court being fully advised in the premises Finds:

1. That said Petitioners at the First Meeting of Creditors of said Bankrupt herein, represented the overwhelming majority of the Bankrupt's creditors both in number and in the aggregate amount of their claims.

2. That John M. England, the nominee of said Petitioners for Trustee, is in all respects qualified to act in that capacity and would administer said bankrupt estate impartially, fairly and accurately.

3. That said nominee, John M. England, is not connected or associated with the Board of Trade of San Francisco or with Walter J. Hempy, the assignee for the benefit of creditors of said Bankrupt.

4. That there is no evidence to support the Referee's finding that the votes of said Petitioners represented an attempt by them to retain some sort of control over the bankrupt estate for the benefit of said Board of Trade.

Wherefore, the Court Concludes:

1. That said Referee in Bankruptcy exercised his discretion to disapprove the election of said John M. England as Trustee of the above estate without good cause therefor.

2. That said Petitioners were not disqualified from voting for their said nominee as such Trustee herein and should not be disenfranchised upon any of the grounds offered by the creditors whose claims voted for said Kal W. Lines as such Trustee and/or by said Referee in Bankruptcy in his said Findings and Order dated May 26, 1954.

It Is Hereby Ordered that the aforesaid Order of said Referee in Bankruptcy dated the said 26th day of May, 1954, whereby said Kal W. Lines was appointed Trustee of the estate of the above-named

Bankrupt be and it is hereby reversed, set aside and annulled; and

It Is Further Ordered that said Referee in Bankruptcy make and enter herein an Order approving the election of and appointing as Trustee of the above-named bankrupt estate the said John M. England, such appointment to be effective upon the filing with said Referee in Bankruptcy by said John M. England of bond with sufficient sureties to be approved by said Referee in Bankruptcy in the sum of $2,500.00; and

It Is Further Ordered that said Referee in Bankruptcy proceed in the above-entitled matter hereafter in all matters in a manner consistent with the views expressed by this Court in its Memorandum and Order dated March 31, 1955, and filed herein on April 1, 1955, and in accordance with this Order.

Dated at San Francisco in said District this 25th day of May, 1955.

/s/ OLIVER J. CARTER,
District Judge.

Approved as to form as provided in Rule 5(e) of the above-entitled Court.

.....,
Attorney for Kal W. Lines.

Receipt of Copy acknowledged.

Lodged April 20, 1955.

[Endorsed]: Filed May 25, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Kal W. Lines hereby appeals to the United States Court of Appeals for the Ninth Circuit from that certain Order Reversing Referee's Order Appointing Kal W. Lines Trustee made and entered in the above-entitled proceedings by the Honorable Oliver J. Carter, one of the Judges of the above-entitled Court, on May 25, 1955, which said order set aside and annulled the order of the Referee in Bankruptcy dated May 26, 1954, appointing Kal W. Lines Trustee of the estate of the above-named bankrupt.

Dated: June 13, 1955.

/s/ MAX H. MARGOLIS,
Attorney for Appellant,
Kal W. Lines.

[Endorsed]: Filed June 13, 1955.

[Title of District Court and Cause.]

UNDERTAKING FOR COSTS ON APPEAL

Whereas, on the 27th day of May, 1954, the Referee in the above-entitled bankruptcy case appointed Kal W. Lines, Trustee thereof; and

Whereas, under date of June 7, 1954, Falstaff Brewing Corporation, Goebel Brewing Company of California, Monteverdi and Parodi, Inc., Ralph

Montali, Inc., Pacific Gas & Electric Company, Pabst Brewing Co., Harry F. Rathjen Co., San Francisco Brewing Corporation, Melvin Sosnick Co., Twin Peaks Distributing Co., Vick's Distributing Co., N. Cervelli & Company, California Hawaiian Association, Brown & Bigelow, Carlo Arbasetti, and The Albert Peters Company, Creditors of said bankrupt, petitioned for a review of the appointment of said Kal W. Lines as Trustee of said bankrupt estate; and

Whereas, under date of May 25th, 1955, the Judge of the said United States District Court for the Southern Division, Northern District of California, issued an order reversing the order appointing Kal W. Lines as Trustee of said bankrupt estate; and

Whereas, the said Kal W. Lines as such Trustee is dissatisfied with said judgment and is desirous of appealing therefrom to the United States Circuit Court of Appeals for the Ninth Circuit.

Now Therefore, In consideration of the premises and of such appeal, The Metropolitan Casualty Insurance Company of New York, a corporation, having its principal place of business in the State of New Jersey and duly incorporated under the laws of the State of New York for the purpose of making, guaranteeing and becoming surety on bonds and undertakings, and having complied with all of the requirements of all of the laws respecting such corporations, does hereby undertake in the sum of Two Hundred Fifty Dollars ($250.00), and

promise on the part of the said appellant that appellant will pay all damages and costs which may be awarded against him on said appeal or on a dismissal thereof, not exceeding the aforesaid sum of Two Hundred Fifty Dollars.

And Further, it is expressly understood and agreed that in case of a breach of any condition of the above obligation, the Court in the above-entitled matter may, upon notice to The Metropolitan Casualty Insurance Company of New York of not less than ten days, proceed summarily in the action in which the same is given to ascertain the amount which the said surety is bound to pay on account of such breach, and render judgment therefore against it and award execution therefor.

Dated at San Francisco, California this 13th day of June, 1955.

THE METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK.
Attorney-in-Fact.

[Seal] By /s/ D. W. PORTER,

State of California,
City and County of San Francisco—ss.

On this 13th day of June in the year One Thousand Nine Hundred and fifty-five before me, Chester K. Dudley, a Notary Public in and for the City and County of San Francisco, State of California, residing therein, duly commissioned and sworn, per-

sonally appeared D. W. Porter, known to me to be the person whose name is subscribed to the within instrument as the attorney-in-fact of The Metropolitan Casualty Insurance Company of New York (a Corporation), and acknowledged to me that he subscribed the name of said Corporation thereto as surety and his own name as attorney in fact.

In Witness Whereof, I have hereunto set my hand and affixed my official seal at my office in the said City and County of San Francisco, the day and year in this certificate first above written.

/s/ CHESTER K. DUDLEY,
Notary Public in and for the City and County of San Francisco, California.

My Commission Expires May 23, 1956.

[Endorsed]: Filed June 13, 1955.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents, listed below, are the originals filed in this Court in the above-entitled case and that they constitute the record on appeal herein as designated by the parties:

Voluntary petition in bankruptcy and verified list of creditors.

Order of Adjudication and Reference.

Statement of Affairs and Schedules A and B.

Certificate and report of referee relative to petition for review of referee's order of May 26, 1954, with summary of record, findings of fact and conclusions of law relative to contest over election of bankruptcy trustee.

Petition for review.

Order extending time to file petition for review.

Order staying administration pending review.

Affidavit of Arthur P. Shapro.

Affidavit of William C. Drinnen.

Affidavit of Ben Singer.

Affidavit of Henry Gross.

Memorandum and Order.

Copy or order reversing referee's order appointing Kal W. Lines, Trustee, lodged April 20, 1955.

Order extending time to file proposed amendments to findings of fact and conclusions of law under Rule 5(e) of the Rules of practice of the above-entitled Court.

Proposed amended findings, conclusions of law and order.

Order.

Order reversing referee's order appointing Kal W. Lines, Trustee.

Notice of appeal.

Designation of contents of record on appeal under Rule 75(a).

Appellee's designation of record on appeal.

Cost bond on appeal.

Claims Nos. 1 to 19, inclusive.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 19th day of July, 1955.

[Seal] C. W. CALBREATH,
Clerk.

By /s/ WM. C. ROBB,
Deputy Clerk.

[Endorsed]: No. 14821. United States Court of Appeals for the Ninth Circuit. Kal W. Lines, Appellant, vs. Falstaff Brewing Co., et al., Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed July 19, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 14821

KAL W. LINES,

Appellant,

vs.

FALSTAFF BREWING COMPANY, et al.,

Appellees.

APPELLANT'S CONCISE STATEMENT OF POINTS TO BE URGED UPON APPEAL

Comes now Kal W. Lines, Appellant herein, and in accordance with Rule 75(d) of the Federal Rules of Civil Procedure, specifies the following as a concise statement of the points of which he intends to rely on the Appeal, from the Order Reversing Referee's Order Appointing Kal W. Lines Trustee, made and entered by the Honorable Oliver J. Carter, United States District Court Judge, for the Northern District of California, on May 25, 1955, and more particularly specified and described in the Notice of Appeal heretofore filed with the Clerk of said District Court on June 13, 1955, as follows:

1. The District Court in said order of May 25, 1955, erred in ordering that the order of the Referee in Bankruptcy dated the 26th day of May, 1954, whereby said Kal W. Lines was appointed Trustee

of the estate of Alfonso Paul San Filippo be reversed, set aside and annulled.

2. The District Court in said order of May 25, 1955, erred in ordering that the Referee in Bankruptcy make and enter an order approving the election of and appointing as Trustee of said bankrupt estate one John M. England and that such appointment be effective upon the filing with the Referee in Bankruptcy by said John M. England of a bond with sufficient sureties to be approved by the Referee in Bankruptcy in the sum of $2,500.

3. The District Court in the order of May 25, 1955, erred in ordering that the Referee in Bankruptcy proceed in said bankruptcy proceedings in all matters in a manner consistent with the views expressed by said Court in its Memorandum and Order dated March 31, 1955, and filed with the Clerk of said Court on April 1, 1955, in accordance with its said order of May 25, 1955.

4. The District Court erred in finding that the Appellees at the first meeting of creditors of said bankrupt represented the overwhelming majority of the bankrupt's creditors, both in the number and in the aggregate amount of their claims.

5. The District Court erred in finding that there is no evidence to support the Referee's finding that the votes of Appellees represented an attempt by them to retain some sort of control over the bankrupt estate for the benefit of the Board of Trade.

6. The District Court erred in concluding that the Referee in Bankruptcy exercised his discretion to disapprove the election of John M. England as Trustee of the bankrupt estate without good cause therefor.

7. The District Court erred in concluding that Appellees were not disqualified from voting for their nominee as such Trustee of the estate of said bankrupt, and should not be disenfranchised upon any of the grounds offered by the creditors whose claims voted for Appellant, Kal W. Lines, as such Trustee and/or by said Referee in Bankruptcy in his Findings and Order, dated May 26, 1954.

Dated: September 21st, 1955.

/s/ MAX H. MARGOLIS,
Attorney for Kal W. Lines,
Appellant.

Receipt of Copy acknowledged.

[Endorsed]: Filed September 22, 1955.

[Title of District Court and Cause.]

STIPULATION

It is hereby stipulated by and between Max H. Margolis, attorney for Kal W. Lines, Appellant, and Messrs. Shapro & Rothschild, attorneys for Appellees, that the proofs of claim numbered 1-19, inclusive, appearing as Item 21 in the Designation of Contents of Record on Appeal under Rule 75(a), may be considered by the above-entitled Court in their original form without the necessity of being printed.

Dated: September 21st, 1955.

/s/ MAX H. MARGOLIS,
Attorney for Kal W. Lines,
Appellant.

SHAPRO & ROTHSCHILD,

By /s/ [Indistinguishable.]
Attorneys for Appellees.

[Endorsed]: Filed September 22, 1955.

No. 14,821

IN THE

United States Court of Appeals

For the Ninth Circuit

KARL W. LINES,
Appellant,

vs.

FALSTAFF BREWING CO., et al.,
Appellees.

BRIEF FOR APPELLANT.

MAX H. MARGOLIS,
155 Montgomery Street, San Francisco 4, California,
Attorney for Appellant.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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No. 14,821

IN THE

United States Court of Appeals

For the Ninth Circuit

KARL W. LINES,
Appellant,

vs.

FALSTAFF BREWING CO., et al.,
Appellees.

BRIEF FOR APPELLANT.

STATEMENT OF JURISDICTION.

The referee in bankruptcy made an order, dated May 26, 1954, appointing appellant trustee in bankruptcy in the matter pending in the District Court and entitled "In the Matter of Alfonso Paul Sanfillipo, Bankrupt". R. 46-55. Appellees' petition to have the order reviewed by the District Court was filed June 7, 1954. R. 67-68. The petition was timely. 11 U.S.C.A., §67 (c). The District Court had jurisdiction to review the order. 11 U.S.C.A. §67 (c). It made an order on May 25, 1955, reversing the order of the referee appointing appellant trustee and ordered the appointment of one John M. England as trustee. R. 94-97. Notice of appeal therefrom to

this court was filed June 13, 1955. R. 98. The appeal was timely. 11 U.S.C.A. §48. Jurisdiction of this court to review the order of the District Court is sustained by 11 U.S.C.A. §47.

STATEMENT OF THE CASE.

Appellant and England were rival candidates for election as trustee at the meeting of the bankrupt's creditors held May 20, 1954. The statement of affairs filed by the bankrupt on April 26, 1954 (R. 10-27) showed that on December 17, 1953, he had made an assignment of all his assets to the Board of Trade of San Francisco for the benefit of creditors. R. 14. It also showed that the Board of Trade had in its hands $4,054.88 belonging to the bankrupt. R. 13. The assignment mentioned had been taken in the name of Walter J. Hempy the secretary of the said Board of Trade.

In contemplation of the said meeting various members of the said Board of Trade as a Creditors' Committee sent out to the creditors of the bankrupt a form letter on the letterhead of the said Board of Trade soliciting their cooperation in the selection of a trustee and also soliciting their signatures to a letter of attorney running in favor of Shapro & Rothschild, attorneys for the Committee. R. 49. Claims of creditors thus solicited, obtained, and represented were disqualified by the referee and rejected in the vote for trustee and the appointment of appellant rather than England resulted. R. 28-30. Among the findings of

fact and conclusions of law made by the referee in his order appointing appellant trustee, were these:

"(9) That in causing to be prepared and sent out the aforesaid letter and each of the aforesaid nineteen (19) claims, in the manner and under the circumstances aforesaid, it was the intent, on the part of said Creditors' Committee, acting for said Board of Trade, indirectly to keep, if possible, some sort of control over the assets of the estate of the above-named bankrupt, at least to the extent of such assets as were in the hands of Walter J. Hempy and/or said Board of Trade.

(10) That, in the light of all the circumstances, it would not be, nor is it, for the best interest of all the creditors of Alfonso Paul Sanfillipo, and particularly the creditors who, or which, are not members of said Board of Trade to count the claims procured in the manner, and under the circumstances aforesaid, in voting for any candidate for trustee in the above-entitled manner. * * *

Because of the state of the record herein and, in the light of all the circumstances shown by said record, the court concludes:

(1) That Karl W. Lines has a majority, both in number and in amount of the claims of creditors which are entitled to be counted herein to be voted for trustee.

(2) That, to allow any of the aforesaid nineteen (19) claims to be voted for any candidate for the herein trusteeship would be for the court to act contrary to the dictates of sound judicial discretion and also contrary to good practice in the bankruptcy court of this jurisdiction." (R. 52-54.)

The order of the District Court on review reversed the order of the referee appointing appellant trustee and appointed England trustee. R. 94-97. This was the vital finding of fact (R. 96):

> "(4) That there is no evidence to support the Referee's finding that the votes of said Petitioners represented an attempt by them to retain some sort of control over the bankrupt estate for the benefit of said Board of Trade."

And the vital conclusions of law were these (R. 96):

> "(1) That said Referee in Bankruptcy exercised his discretion to disapprove the election of said John M. England as Trustee of the above estate without good cause therefor.
>
> (2) That said Petitioners were not disqualified from voting for their said nominee as such Trustee herein and should not be disenfranchised upon any of the grounds offered by the creditors whose claims voted for said Karl W. Lines as such Trustee and/or by said Referee in Bankruptcy in his said Findings and Order dated May 26, 1954."

SPECIFICATION OF ERRORS.

1. The District Court erred in finding that "there is no evidence to support the Referee's finding that the votes of said Petitioners represented an attempt by them to retain some sort of control over the bankrupt estate for the benefit of said Board of Trade", for the reason that the finding by the referee to the

contrary was not clearly erroneous but was supported by substantial evidence and reasonable inferences.

2. The District Court erred in concluding that "said Referee in Bankruptcy exercised his discretion to disapprove the election of said John M. England as Trustee of the above estate without good cause therefor", for the reason that the conclusion is contrary to the law and the evidence.

3. The District Court erred in concluding that "said Petitioners were not disqualified from voting for their said nominee as such Trustee herein and should not be disenfranchised upon any of the grounds offered by the creditors whose claims voted for said Karl W. Lines as such Trustee and/or by said Referee in Bankruptcy in his said Findings and Order dated May 26, 1954", for the reason that the conclusion is contrary to the law and the evidence.

4. The District Court erred in reversing the order of the referee dated May 26, 1954, appointing appellant trustee of the estate of the said bankrupt.

5. The District Court erred in ordering the referee to make and enter an order approving the election and appointing John M. England trustee of the estate of the said bankrupt.

ARGUMENT.

1. **THE DISTRICT COURT ERRED IN FINDING THAT "THERE IS NO EVIDENCE TO SUPPORT THE REFEREE'S FINDING THAT THE VOTES OF SAID PETITIONERS REPRESENTED AN ATTEMPT BY THEM TO RETAIN SOME SORT OF CONTROL OVER THE BANKRUPT ESTATE FOR THE BENEFIT OF SAID BOARD OF TRADE", FOR THE REASON THAT THE FINDING BY THE REFEREE TO THE CONTRARY WAS NOT CLEARLY ERRONEOUS BUT WAS SUPPORTED BY SUBSTANTIAL EVIDENCE AND REASONABLE INFERENCES.** (Specification of Error No. 1.)

A bankruptcy court is a court of equity and the broad principles and rules of equity jurisprudence govern and apply in the administration of a bankrupt's estate. (*Pepper v. Litton,* 308 U.S. 293, 304, 60 S.Ct. 238, 244, 84 L. Ed. 281.)

In the application of those equitable principles and rules in the appointment of a trustee for the bankrupt estate, a wide discretion is confided to the referee in bankruptcy, for the law demands not only an impartial trustee but a trustee remote and immune from possible adverse interest. (*Sloan's Furriers v. Bradley,* 6 Cir. 146 F. 2d 757, 758-759; *In Re Leader Mercantile Co.,* 5 Cir. 36 F. 2d 745, 746; *Larson v. First State Bank,* 8 Cir. 21 F. 2d 936, 938; *Wilson v. Continental Building & Loan Assn.,* 9 Cir. 232 F. 2d 824, 827-828; *In Re Deena Woolen Mills,* D.C.Me. 114 F. Supp. 260, 267-270; *In Re Los Angeles Lumber Products Co.,* D.C.Cal. 46 F. Supp. 77, 87-88; *In Re Stowe,* D.C.Cal. 235 F. 463, 464.)

On the evidence before him and the reasonable inferences therefrom the referee could rationally find and did find that the claims voting for England as

trustee were solicited and sponsored by the Board of Trade of San Francisco, assignee of the bankrupt for the benefit of creditors, and the holder of assets of the bankrupt for which it would be accountable to the trustee of the bankrupt estate. There was no abuse of discretion here. (*Lagnes v. Green,* 282 U.S. 531, 541, 51 S.Ct. 243, 247, 75 L.Ed. 520, 525; *Delno v. Market St. Ry. Co.,* 9 Cir. 124 F. 2d 965, 967.)

On review, the law demanded that the District Court accept the findings of the referee since they were not clearly erroneous. (*Earhart v. Callan,* 9 Cir. 221 F. 2d 160, 164-165; *Gamewell Company v. City of Phoenix,* 9 Cir. 216 F. 2d. 928, 931.) The District Court did not do so. It erred in setting aside the findings of the referee and its finding to the contrary, here challenged, is clearly erroneous and against the law and the evidence.

---

2. THE DISTRICT COURT ERRED IN CONCLUDING THAT "SAID REFEREE IN BANKRUPTCY EXERCISED HIS DISCRETION TO DISAPPROVE THE ELECTION OF SAID JOHN M. ENGLAND AS TRUSTEE OF THE ABOVE ESTATE WITHOUT GOOD CAUSE THEREFOR, FOR THE REASON THAT THE CONCLUSION IS CONTRARY TO THE LAW AND THE EVIDENCE. (Specification of Error No. 2.)

The vitality of the conclusion of law above quoted depended upon the vitality of the finding of the District Court discussed in the preceding subdivision. The demonstration there that such finding was clearly erroneous is equally a demonstration here that the above conclusion of law is contrary to the law and the evidence.

3. **THE DISTRICT COURT ERRED IN CONCLUDING THAT "SAID PETITIONERS WERE NOT DISQUALIFIED FROM VOTING FOR THEIR SAID NOMINEE AS SUCH TRUSTEE HEREIN AND SHOULD NOT BE DISENFRANCHISED UPON ANY OF THE GROUNDS OFFERED BY THE CREDITORS WHOSE CLAIMS VOTED FOR SAID KARL W. LINES AS SUCH TRUSTEE AND/OR BY SAID REFEREE IN BANKRUPTCY IN HIS SAID FINDINGS AND ORDER DATED MAY 26, 1954", FOR THE REASON THAT THE CONCLUSION IS CONTRARY TO THE LAW AND THE EVIDENCE.** (Specification of Error No. 3.)

The argument in the preceding subdivision is applicable here. It need not be repeated.

---

4. **THE DISTRICT COURT ERRED IN REVERSING THE ORDER APPOINTING APPELLANT TRUSTEE AND IN ORDERING THE APPOINTMENT OF JOHN M. ENGLAND AS TRUSTEE.** (Specification of Errors Nos. 4 and 5.)

The order of the District Court crumbles in such respects when it is devitalized of the findings and conclusions of law previously discussed. This is so obvious that additional argument is unnecessary.

CONCLUSION.

Appellant therefore respectfully submits that the order appealed from should be reversed with directions to the District Court to affirm the order of the referee.

Dated, San Francisco, California,
January 16, 1956.

MAX H. MARGOLIS,
Attorney for Appellant.

No. 14,821

IN THE

United States Court of Appeals

For the Ninth Circuit

KAL W. LINES,
Appellant,

vs.

FALSTAFF BREWING CO., et al.,
Appellees.

BRIEF FOR APPELLEES.

SHAPRO & ROTHSCHILD,
By ARTHUR P. SHAPRO,
105 Montgomery Street, San Francisco 4, California,
Attorneys for Appellees.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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No. 14,821

IN THE

United States Court of Appeals

For the Ninth Circuit

KAL W. LINES,
Appellant,

vs.

FALSTAFF BREWING CO., et al.,
Appellees.

BRIEF FOR APPELLEES.

STATEMENT OF FACTS.

Appellees are sixteen (16) creditors of the above estate whose claims aggregate $3,735.56. These claims, plus those of four other creditors, Edwin J. Marino, Pacific Coast Brands, Eagle Vineyard Products and Gallo Sales Company, were all duly presented for voting at the first meeting of creditors of the above estate by the attorneys in fact designated in the Powers of Attorney contained in their respective proofs of claim. Said twenty (20) claims aggregating $4,508.67 were so voted for John M. England, as Trustee of the above estate. There were voted for appellant, Kal W. Lines, only five (5) claims totaling $407.22. Only one (1) of the twenty (20) claims

voted for Mr. England, to wit, one claim for $193.85, of Pacific Coast Brands, which was voted by Mr. England personally, was not objected to by appellant.

While the record is somewhat obscure as to the exact nature and grounds of the objections made on behalf of appellant to the voting of the nineteen (19) claims for Mr. England, it would appear that said objections are based entirely upon an alleged impropriety of permitting these creditors to select a trustee herein. These claims were admittedly solicited by the Creditors' Committee of this bankrupt at the Board of Trade of San Francisco on the letterhead of the latter (which letter was signed by the five (5) members of the Creditors' Committee). (See Transcript of Record, page 49.) Although at the beginning of the hearing before the referee (T.R. 29) appellant's counsel appears to have raised some question concerning the alleged solicitation of these claims for voting purposes by the Board of Trade, near the end of the hearing appellant asserts that "we make no charge . . . of improper solicitation. Mr. Shapro knows there was no indication of it when we went over these claims." (T.R. 38.)

Under these circumstances, appellees contend that the only basis upon which they, as creditors, could properly have been disenfranchised by the Referee in Bankruptcy and their preponderance of voting claims, in both number and amount, for Mr. England as Trustee disregarded and disapproved by the Referee's Order herein, was that their nominee, if elected, would have an interest adverse to the estate in ques-

tion and/or would not fairly and honestly administer same.

ARGUMENT.

1. The District Court was not in error in finding that "there is no evidence to support the Referee's finding that the votes of said appellees represented an attempt by them to retain some sort of control over the bankrupt estate for the benefit of said Board of Trade", for the reason that the finding by the Referee to the contrary was clearly erroneous and was not supported by substantial evidence and/or reasonable inferences.

A. THE STATUTES.

The Bankruptcy Act, Section 44(a), 11 U.S.C.A., Section 72(a), provides:

> "(a) *The creditors* of a bankrupt, exclusive of the bankrupt's relatives or, where the bankrupt is a corporation, exclusive of its stockholders or members, its officers, and the members of its board of directors, or trustees or of other similar controlling bodies, *shall,* at the first meeting of creditors after the adjudication . . . *appoint a trustee . . . of such estate.*" (Italics ours.)

Obviously, none of your appellees are within the class excluded from voting by the foregoing statutory provision. Prior to February 13, 1939, under General Order in Bankruptcy No. 13, 11 U.S.C.A., page 53, as of which date it was abrogated by the Supreme

Court of the United States, the appointment of a trustee by the creditors was "subject to be approved or disapproved by the Referee." We can find neither in the General Orders in Bankruptcy nor in the Bankruptcy Act itself any similar or revised provision giving the Referee in Bankruptcy any such specific authority. It would seem, therefore, that although prior to February 13, 1939 (under conditions which will be hereinafter discussed, and which are wholly inapplicable to the case at bar), the referee might have undertaken to disapprove the election of a trustee, under the law applicable to the case at bar, the referee obviously had no such jurisdiction. It should here be noted that the abrogation of former General Order No. 13 in February 1939 was made shortly after the Chandler Act Amendment to the Bankruptcy Act became effective in September 1938. Previously, Section 44(a) did not specifically provide the exceptions to the absolute right of creditors to appoint a trustee, hence the supervisory jurisdiction conferred upon the referee by the Supreme Court's General Order. The 1938 Amendment to Section 44(a) gives the specific exceptions, hence the supervisory powers of the Referee elections were deemed unnecessary.

B. DISCUSSION OF CASES CITED BY APPELLANT.

That a Bankruptcy Court is a court of equity and that the broad principles and rules of equity jurisprudence govern and apply in administration of a bankrupt estate is not disputed by appellees. How-

ever, the exercise of the equitable principles and the discretion conferred upon the referee in bankruptcy must be in conformity with the law, and as was stated by Judge Carter in his Memorandum and Order of March 31, 1955 (T.R. 84), the referee cannot "torture some adverse or conflicting interest . . .".

In appellant's opening brief at pages 6 and 7 cases are cited which, among others, are set forth by the Referee in support of his Order, both in his certificate and the Transcript of Record, page 27. *None* of the cases therein cited involved contested elections of a trustee in bankruptcy which took place after the abrogation of General Order No. 13. For that reason, we feel, they are not in point.

However, on the general subject of the alleged "adverse interest" and on the theory that even without such General Order, the Referee might possibly have power to sustain objections to the election as Trustee of a person disqualified by adverse interests, or by lack of personal qualifications and/or integrity. These cases will be discussed and distinguished.

In re Stowe, 235 F. 463, 38 Am. B.R. 76, was a case in which there was evidence that the bankrupt was involved in soliciting the claims for the disqualified candidate for the Trustee, and also indication that the attorney for the assignee for the benefit of creditors was attempting to control the election. No such facts appear in the instant case.

In re Leader Mercantile Co., (C.C.A. 5) 36 F. (2d) 745, 746, involves a situation where one Hall, who

received votes of the majority in number and amount of claims withdrew and took no further part after the Referee vetoed his election by reason of his activities in soliciting claims. Strangely enough, one of the points overruled by the court in that case was the alleged lack of authority in the Supreme Court to adopt General Order No. 13. The decision is based principally upon the now abrogated General Order No. 13 and, further restricts the rights of creditors to select the trustee *only* to the extent that their nominee be a "competent person". The court there holds that "competent" within the intent of the Act has a very broad meaning equivalent to "qualified" and fulfilling all the requirements of the case, and further, "while undoubtedly the policy of the courts is to permit the creditors to have the broadest latitude in the administration of the bankrupt's estate, nevertheless the courts are charged with the duty of supervision, and there is always the power in a court to intervene to prevent the selection of an *incompetent* person as trustee. *Of course, this power is not to be used arbitrarily but only for good cause, in the exercise of sound judicial discretion."* (Italics ours.) This latter quotation does not appear in the Referee's notes nor in the appellant's brief, and supports appellees' position herein.

In re Deena Woolen Mills, (D.C., Me.) 114 F. Supp. 260, 267, 268, involves an exaggerated and inflammatory situation where the attorneys for the assignee and the receiver solicited claims and where the attorney for the assignee for the benefit of creditors had been selected by the attorneys for the bankrupt. Solicita-

tion of claims by a receiver or his attorney is expressly prohibited by General Order No. 39, which reads as follows:

> "Neither a receiver nor his attorney shall solicit any proof of power of attorney, or other authority to act for or represent any creditor for any purpose in connection with the administration of an estate or the acceptance or rejection of any arrangement or plan."

Neither the Bankruptcy Act nor the General Orders prohibit anyone but a receiver or his attorney from soliciting claims. Not even an assignee for the benefit of creditors is so disqualified. (*Garrison v. Pilliod Cabinet Co., et al.,* 50 Fed. 2d 1035.)

Langnes v. Green, 282 U.S. 531, 541, 51 S.Ct. 243, 247, 75 L.Ed. 520, 526, is merely an admiralty case.

The case of *Delno v. Market St. Ry. Co.,* (C.C.A. 9), 124 F. (2d) 965, 967, is inapplicable to the case at bar, and merely defines the legal concept of a court's "discretion".

By statute, the unqualified right to appoint trustees in bankruptcy vests in the creditors. (*In re Harris Construction Company,* 37 F. (2d) 951, 14 Am. B.R. (n.s.) 641.) Approval or disapproval of their choice must be for reason, and based on the exercise of wise discretion. There must be reason for disapproval or removal.

In re Mayflower Hat Co., Inc., 65 F. (2d) 330;
In re Harris Construction Company, supra;
In re Bay Parkway Haberdashers & Hatters, Inc., 59 F. (2d) 103;

In re Van de Mark, (D.C.) 175 Fed. 287, Am. B.R. 760;

In re Malino, 118 F. 368, 8 Am. B.R. 205.

Remington on Bankruptcy, Fourth Edition, Volume 2, Section 1094, page 631, at 633:

"All must agree that the vital interest which creditors have in the preservation and wise management of the estate of the bankrupt, must, as a general rule, make them the best judges of who shall be appointed as trustee, and their selection cannot be arbitrarily ignored." (*Wilson v. Continental Building and Loan Association,* 232 F. 824, 37 Am. B.R. 444.)

"The choice of the creditors should not be overruled by the Referee or District Judge except for substantial reasons, and the confirmation by the District Judge of such appointment should not be disturbed by this Court unless an abuse of discretion appears." (*In re Merritt Construction Company,* 219 F. 555, 33 Am. B.R. 616.)

"If the persons appointed by creditors are competent to perform the duties, and if they have residence or an office in the District, the Creditors' appointment should be approved." (Remington on Bankruptcy, supra, page 633.)

"The policy of the Bankruptcy Act as shown in its provisions is to give to creditors of the Bankrupt the free, deliberate and an unbiased choice in the first instance of the persons who are to represent them and manage the assets of the Bankrupt estate. (*In re Lewensohn,* supra.) It cannot be denied that the vital interests which creditors have in the preservation and wise management of the estate of a bankrupt must as a

general rule make them the best judges of who shall be appointed as Trustee, and their selection cannot be arbitrarily ignored." (*Wilson v. Continental Building and Loan Association,* supra.)

In re Allied Owners Corp., Bankrupt, 4 F. Supp. 684, 24 Am. B.R. (n.s.) 151, involves a petition for review of an order disapproving an election of one Greve as trustee on the grounds of partiality in or connected with the transaction and affairs of the bankrupt, and wherein the Referee's order was reversed. The court discussed the rights of creditors in the election of a trustee, and, in finding that Greve was merely associated with affiliated companies of the bankrupt, held that this was not sufficient to disqualify him, and pointed out that his familiarity with the business enhanced his desirability.

"Courts should not assume that *creditors* cannot elect an impartial Trustee. *Their choice should be recognized and upheld unless contrary to law* or it appears that the Trustee so selected has interests which conflict with those of the general creditors of the bankrupt estate, (*In re Mayflower Hat Co.,* (C.C.A.) 65 F. (2d) 330, 331,) or unless there is reason for believing that the selection has been directed, managed, or controlled by the bankrupt or his attorney, or by some influence opposed to the creditors' interests. (*In re Eastlack,* (D.C.) 145 F. 68, 73.)

"The sole power conferred by the Bankruptcy Act on the Referee or judge in relation to the appointment of a Trustee is contained in Section 44 (11 U.S.C.A. 72, supra) where it is provided that, if the creditors do not appoint, 'the court

shall do so.' *The Act, therefore, contains no provision conferring on the Referee or judge the right to disapprove an appointment made by the creditors.* (*In re Krueger,* (D.C.) 196 F. 705, 707.) The right so to do is to be found in General Order 13 (11 U.S.C.A., p. 53) promulgated by the Supreme Court pursuant to statute, which provides: 'The appointment of a trustee by the creditors shall be subject to be approved or disapproved, and he shall be removable, by the referee or by the judge.'

"Thus *by this General Order courts of bankruptcy are vested with a supervisory power* to meet emergencies and exigencies which could not be foreseen or provided for in the statute. But the emergency must not be a trivial one. It should be of grave character and due weight, for *the effect of the use of this supervisory power is to disenfranchise the creditors and deprive them of rights expressly conferred upon them by statute.* (*In re Lloyd,* (D.C.) 148 F. 92, 93.) Since this is the ultimate result of the use of this supervisory power, its use must be sparingly exercised with sound judicial discretion and not arbitrarily or capriciously." (Italics ours.)

The above indicates that even this limited supervisory power in the Court was derived from the now abrogated General Order No. 13.

In *Mayflower Hat Co., Inc.,* 65 F. (2d) 330, on principle, it cannot be perceived why an agent for a creditor should not be permitted to vote as a creditor might, if by so voting he is not disqualified to vote for himself to act as trustee. If the creditors

who have unsecured claims filed and allowed . . . may vote for themselves, they may authorize agents to vote, and the majority of creditors in number and amount may control the election, and their choice must be upheld by the court, unless it appears that the trustee so elected has no interest adverse to the bankrupt estate.

See, also:

In re Lazoris, (D.C.) 120 F. 716;
In re Van de Mark, (D.C.) 175 F. 287.

In *In re Cass and Daley Shoe Co.,* 11 F. (2d) 872, held that if openly and honestly organized and conducted, a Creditors' Committee in bankruptcy proceedings may be of great assistance. Creditors' assignment of claims to Creditors' Committees was held not to disenfranchise them or the representative of such Creditors' Committee from voting for a trustee. The bankrupt may put itself into the hands of such a committee or in the hands of its principal creditors and such an act is not "collusion" in the sinister bankruptcy use of the word, *and these creditors have the right to vote for trustee.*

The Referee, in the order reversed by the District Judge, did exactly what the Circuit Court in the case of Cass and Daley Shoe Co., supra, disapproved, and the latter Court reversed an order of a referee similar to that of Referee Wyman in the instant case, which, by the order of the District Judge here appealed from, was also reversed.

As indicated above, at the hearing before the Referee, appellees, through their counsel, made a detailed

"offer of proof". (Ref. Cert., T.R. 31-33.) The relevancy of the evidence offered and so improperly rejected by the Referee is obvious from the context thereof in the light of the decisions above cited. In view of the fact that no contrary evidence was either offered or received, it would seem that the record is clearly devoid of evidence to support the Referee's disenfranchisement of appellees. If, as we contend, the offer of proof should have been accepted, the record would overwhelmingly support the propriety of the election of Mr. England by 20 creditors out of the 25 voted, and whose claims aggregated over 95% of the amount thereof.

The complete lack of control or even suggestion of the selection of Mr. England as their candidate by the Board of Trade, and/or the Creditors' Commiteee itself, was clearly indicated by the evidence so offered by appellees and refused by the Referee. The impartiality of the administratioin of the bankrupt's estate as to Mr. England himself was openly conceded by appellant (T.R. 35),

> "Mr. Shapro. . . . If I may, I should like to direct a question to Mr. Margolis in connection with this objection, so the record may be clear. I would like to know if it is your contention, Mr. Margolis, that if Mr. England's election as trustee in this case were approved by this Court, that he would administer this estate other than impartially, fairly and accurately?
>
> Mr. Margolis. Absolutely not. . . ."

and it is further emphasized and supported, without contradiction, by all of the evidence in the record and

that which was so offered and refused. (Referee's Finding No. 14 (T.R. 54).)

The Referee's decision in this case was not based upon "sound judicial discretion", was not used "sparingly", and was, in effect, arbitrarily exercised. We are at a loss to understand the action of the Referee in this case.

CONCLUSION.

At no time have appellees contended that the Referee has no jurisdiction, *in a proper case,* to sustain objections to and/or disapprove the election of a trustee by creditors whose interests are, or might be adverse to the bankrupt estate itself; but conversely, our position is that the Referee's actions in so doing "must be governed entirely upon statutory principles." The statute in question is Section 44(a) of the Bankruptcy Act, 11 U.S.C.A., Sec. 72(a), fully discussed above.

The only basis upon which these creditors could properly have been disenfranchised by Referee Wyman was *if* there was sufficient *evidence* that Mr. England, their nominee, would have an interest adverse to the estate and/or would not fairly and honestly administer same. (Ref. Cert. T.R., p. 38.) *The evidence received by the Referee* as well as that offered by appellees and refused by the Referee (Ref. Cert. T.R. 31 through last full paragraph p. 32), *is all to the contrary.*

As he said in his Memorandum and Order (T.R. p. 80), the District Judge gave full weight to the Referee's findings, but found them erroneous. Judge Carter's opinion (T.R. pp. 79-85) clearly indicates the full consideration given by him to the record, and his order of reversal (T.R. pp. 94-97) is amply justified.

We believe that there was neither substantial legal ground shown before Referee Wyman, nor any evidence upon which his contrary findings or conclusions could be predicated, justifying the disenfranchisement of the vast majority of the creditors who, including appellees, selected Mr. England rather than appellant to act as trustee of the above estate. The District Court's order of March 31, 1955 should be affirmed by this court.

Dated, San Francisco, California,
February 17, 1956.

Respectfully submitted,
SHAPRO & ROTHSCHILD,
By ARTHUR P. SHAPRO,
Attorneys for Appellees.

No. 14,821

IN THE

United States Court of Appeals

For the Ninth Circuit

KARL W. LINES,

Appellant,

vs.

FALSTAFF BREWING CO., et al.,

Appellees.

APPELLANT'S REPLY BRIEF.

MAX H. MARGOLIS,
155 Montgomery Street, San Francisco 4, California,
Attorney for Appellant.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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1. SECTION 44(a) OF THE BANKRUPTCY ACT.

Because section 44(a) of the Bankruptcy Act (11 U.S.C.A., §72(a)) disqualifies certain creditors from voting for a trustee, the appellees contend that a referee no longer has supervisory power to disqualify other creditors from such voting. (Brief for Appellees, 3-4, 13.) Obviously, section 44(a) does not purport to exhaust the list of disqualified creditors, for other sections of the Bankruptcy Act also enumerate disqualified creditors. In that connection it is enough to refer to section 56 of the Act (11 U.S.C.A., §92) having reference to secured creditors.

The real question here, of course, is whether the referee had supervisory power, on equitable grounds,

to disqualify creditors other than those enumerated in said section 44(a) or other sections of the Act. That question was left open by this court in *West Hills Memorial Park v. Doneca,* 9 Cir. 1942, 131 F. 2d 374, where an order appointing a trustee was affirmed. But in the earlier case of *Wilson v. Continental Building & Loan Assn.,* 9 Cir. 1916, 232 F. 824, this court unmistakably held that a bankruptcy court had supervisory power, on equitable grounds, to disqualify certain creditors from voting for a trustee. In affirming an order disqualifying such creditors, it was there said, at page 827:

> "(1) The petitioners invoke the general right of creditors to appoint a trustee of the bankrupt estate, and while admitting that the appointment is, by General Order 13 . . . subject to approval or disapproval by the referee, they argue that action by the referee is not to be exercised arbitrarily, but only for cause. There can be no dispute with this general rule. All must agree that the vital interest which creditors have in the preservation and wise management of the estate of the bankrupt must, as a general rule, make them the best judges of who shall be appointed as trustee, and their selection cannot be arbitrarily ignored. *But the Supreme Court, in the exercise of its power to make general orders in bankruptcy, foresaw that instances might arise where, notwithstanding the desire of the creditors for the selection of some particular person as trustee, the best interests of the estate would not be served by allowing such choice to stand, and they reserved a supervisory power in the referee or judge.*" (Emphasis added.)

The supervisory power of a referee to equitably control the election of a trustee was confirmed in *Austin Resort & Land Co.,* D.C.Cal. 1935, 12 F. Supp. 459, the court saying, at page 463:

> "A court of bankruptcy is a court of equity; * * *
>
> (4, 5) There is nothing in the Bankruptcy Act making the selection of a trustee by the creditors absolute at all events. Proceedings in bankruptcy are flexible and liberal and in their major aspects administrative. Such proceedings are intended to be and usually are carried out informally. * * * (6) . . . But it is the settled practice of this court not to disturb the acts of the referee 'in administrative matters—of which the election of a trustee is a typical example—unless a plain and injurious error of law or abuse of discretion is shown.' In re Rosenfield-Goldman Co. (D.C.) 228 F. 921, 923."

And the supervisory power of a referee to equitably disqualify certain creditors was upheld in *In re Stowe,* D.C.Cal. 1916, 235 F. 463, where it was said, at page 464:

> "There is no disposition on the part of the court to prevent the creditors of a bankrupt from selecting a trustee. But when some of the creditors knowingly join with the attorney of an assignee, whose interests are adverse to the interests of all the creditors of the bankrupt, in an endeavor to control the selection of the trustee, in which endeavor the bankrupt himself participates, the creditors who do not participate in such endeavor are entitled not to be left helpless in the face of such a union. The theory of the bank-

> rupt law is that the assets of a bankrupt shall be honestly collected and honestly distributed among all the creditors. Neither the bankrupt himself, nor his attorney, nor an assignee, nor his attorney, can be permitted to control the selection of a trustee. If creditors knowingly join with the bankrupt or his attorney, or with an assignee or his attorney, in an effort to do what it has repeatedly been decided they may not do, the simplest and most obvious way to defeat their purpose is to reject their selection of trustee, and permit the creditors who are not in the combination to make the selection. That was done in the present instance and the action of the referee is affirmed."

The case of *In re Stowe,* just cited, was cited with approval in *Schwartz v. Mills,* C.A. 2d N.Y. 1951, 192 F. 2d 727, 730, in support of the statement that "a trustee should not owe his selection to those whom he must sue for restoration of the bankrupt's estate".

Another contention in the brief for appellee (page 4) is that the abrogation of General Order 13 in February of 1939 deprived referees of supervisory power, on equitable grounds, over the election of trustees. This rather startling contention is made despite the fact that the Chandler Amendments modernizing the Bankruptcy Act in 1938 greatly increased the powers of referees. There is no merit whatever in the contention. General Order 13 was abrogated in 1939 for the very simple reason that "it was superfluous in view of the specific provisions in the Bankruptcy Act conferring jurisdiction upon the court to approve the

appointment of trustees". (6 Am. Jur. 911, §631, Note 10.) Section 1(9) of the Act (11 U.S.C.A. §1(9)) provided that " 'Court' shall mean the judge or the referee of the court of bankruptcy in which the proceedings are pending". Section 2(a)(17) of the Act (11 U.S.C.A., §11(a)(17)) invested courts of bankruptcy with jurisdiction "at law and in equity" to "Approve the appointment of trustees by creditors or appoint trustees when creditors fail so to do; and, upon complaints of creditors or upon their own motion, remove for cause receivers or trustees upon hearing after notice". It is elementary that "Jurisdiction to approve necessarily includes jurisdiction to disapprove an appointment". (6 Am. Jur. 911, §631.) And that it was not the intention of the Act to deprive referees of any of their powers existing at the enactment of the Chandler Amendments of 1938 is clearly indicated by section 2(b) of the Act (11 U.S.C.A., §11(b)) which provides:

> "(b) Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated."

That the referee in the present case had supervisory power, in equitable grounds, to disqualify creditors from voting for a trustee, is therefore plain.

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2. EQUITABLE GROUNDS.

The referee was convinced, in the light of all the circumstances before him, that it was not for the best

interest of all the creditors of the bankrupt, and particularly those who were not members of the Board of Trade, that a Board of Trade sponsored candidate be elected trustee. He made his finding accordingly. (T. 33.) All of the business assets of the bankrupt, amounting to $4045.88, had been assigned to the Board of Trade and such assets were in its possession. The claims of creditors amounted to $26,107.14. (T. 19.) Of this amount, a claim in the sum of $13,824.33 was held by relatives of the bankrupt. The claims held by members of the Board of Trade amounted to $4508.67. (Brief for Appellee 1.) It was not at all improbable that a Board of Trade sponsored trustee would favor those electing him or be subject to influence from them. It was not at all improbable that a controversy over the business assets in the hands of the Board of Trade might develop. In disqualifying the Board of Trade sponsored creditors, the referee exercised a sound discretion on equitable grounds. That discretion should not be disturbed.

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3. REVIEW OF DISCRETION.

In *Morris Plan Industrial Bank v. Henderson,* 2 Cir. 1942, 131 F. 2d 975, it was said, at pages 976 and 977:

> "(1, 2) The first question is as to the extent of our review: whether the case comes before us as it came before the district judge, or whether he had a larger latitude in reviewing the referee's

findings than we have. General Order 47, 11 U.S. C.A. following section 53, requires the judge to 'accept his (the referee's) findings of fact unless clearly erroneous.' These are the same words as those used in Rule 53(e)(2), 28 U.S.C.A. following section 723c, and substantially the same as those in Rule 52(a) which requires us not 'to set aside' the finding of a judge unless it too is 'clearly erroneous.' It is true that logically a distinction can be drawn between holding a referee's finding to be 'clearly erroneous' and holding a judge's finding that a referee's finding is 'clearly erroneous' to be 'clearly erroneous.' Possibly the Seventh Circuit meant to make that distinction in a case that arose under General Order 47 before it was amended. In re Duvall, 103 F. 2d 653. We should regret, however, to be compelled now to introduce such refinements into the solution of what is after all only a practical problem. Everyone forms his conclusions from testimony, not only from the words which he hears the witnesses utter but from their appearance when they utter them; and the added weight to be attached to a referee's finding, or to a judge's (if he sees the witnesses) depends upon the fact that he has in effect had evidence before him which cold print does not preserve. So far, therefore, as the words themselves leave any latitude, the referee's conclusion ought to prevail because we cannot appraise the cogency of the lost evidence. In the end, as we have often said, the responsibility for the right conclusions remains the judge's as indeed it does ours; In re Kearney, 2 Cir. 116 F. 2d 899; but we have again and again held that except in plain cases we should accept the referee's findings. (Citations.) We therefore

hold that the question is the same in this court as it was in the district court."

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4. APPELLEES' CASES.

Without exception, the cases cited by appellees (pp. 7-12) were all decided long before the enactment of the Chandler Amendments to the Bankruptcy Act in 1938. Each was decided at a time when the powers of a referee were much less than they now are. Each turns on a set of facts factually different from the facts and circumstances upon which the referee acted in this case. Some of the appellees' cases are inconsistent with the cases cited by appellant from the decisions in this circuit. The case of *In re Harris Construction Company,* 37 F. 2d 951, at the head of appellees' list, involved a set of facts where the referee disregarded all nominations for trustee and summarily made an appointment. Appellees cite *In re Bay Pakaway Haberdashers & Hatters, Inc.,* 59 F.2d 103. (p. 7.) It does not appear in 59 F. 2d.

Finally, appellees point out that appellants made no complaint about the ability or integrity of candidate England. (p. 12.) As said in *In re Bloomberg,* D.C.Minn. 1931, 48 F. 2d 635, "the complaint is not against him, but against the method used in securing his appointment".

CONCLUSION.

Appellant therefore again respectfully submits that the order appealed from should be reversed with direction to the District Court to affirm the order of the referee.

Dated, San Francisco, California,
March 7, 1956.

MAX H. MARGOLIS,
Attorney for Appellant.

No. 14,821

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APPELLEES' PETITION FOR A REHEARING.

SHAPRO & ROTHSCHILD,
105 Montgomery Street, San Francisco 4, California,
Attorneys for Appellees and Petitioners.

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APPELLEES' PETITION FOR A REHEARING.

To the Honorable William Denman, Chief Judge, and to the Honorable Associate Judges of the United States Court of Appeals for the Ninth Circuit:

Come now Falstaff Brewing Corp., Goebel Brewing Company of California, Monteverde & Parodi, Inc., Ralph Montali, Inc., Pacific Gas & Electric Company, Pabst Brewing Company, Harry F. Rathjen Co., San Francisco Brewing Corporation, Melvin Sosnick Company, Twin Peaks Distributing Co., Vick's Distributing Company, N. Cervelli & Company, California Wine Association, Brown & Bigelow, Carlo Arbasetti, The Albert Peters Co., Appellees herein and hereby petition the above entitled Court for a rehearing of

the above entitled matter and for an Order setting aside the Opinion and Judgment of the above entitled Court herein made on the 15th day of May, 1956 and hereby specify each and all of the following as grounds for such rehearing:

I.

That the aforesaid Judgment of the above entitled Court is contrary to law and to legal precedent, and among other things, is contrary to the decision of the United States Circuit Court of Appeals for the Tenth Circuit in the matter of *Garrison v. Pilliod Cabinet Co., et al.,* 50 F.(2d) 1035, 18 ABR (NS) 409 which latter decision of a court of equal jurisdiction with the above entitled Court (cited Appellees' Brief p. 7) is neither cited nor distinguished in the Opinion of the above entitled Court dated the said 15th day of May, 1956.

II.

That, contrary to the observations of the above entitled Court in its said Opinion herein, Appellees at no time before the above entitled Court contended that the Referee in Bankruptcy herein had no jurisdiction to disapprove the election of a trustee. On the contrary, counsel for Appellees conceded, in open court, upon the argument of the above entitled matter, that the Referee in Bankruptcy had such a power, but that, as Appellees also pointed out in their Brief (p. 6) "this power is not to be used arbitrarily but only for good cause, in the exercise of sound judicial

discretion". In the "CONCLUSION" to Appellees' Brief (p. 13) Appellees conceded that "At no time have appellees contended that the Referee has no jurisdiction, *in a proper case,* to sustain objections to and/or disapprove the election of a trustee by creditors whose interests are, or might be adverse to the bankrupt estate itself, but conversely, our position is that the Referee's actions in so doing 'must be governed entirely upon statutory principles' ".

III.

That there was not sufficient or, in fact any evidence in the record herein to justify the application to this case by the above entitled Court of the legal and equitable principles of disqualification of these creditors from nominating and, in effect, disenfranchising Appellees from electing the trustee herein.

IV.

That it has been held (*Garrison v. Pilliod Cabinet Co.,* supra) that even the assignee for the benefit of creditors, himself, is not disqualified from soliciting claims in bankruptcy proceedings (for voting purposes). Here, in the case at bar, we do not have the assignee soliciting the claims, but merely the creditors' committee who admittedly are members of the Board of Trade of San Francisco, of which and for which Mr. Hempy acted as assignee for the benefit of the creditors of the above named bankrupt; and there was no showing before the trial court by Appellant, and hence there is not in the record before

Certificate of Counsel

We hereby certify that the foregoing Petition for Rehearing is, in our opinion, well founded in fact and in law and is not interposed for delay.

Dated, San Francisco, California,
June 11, 1956.

Shapro & Rothschild,
By Arthur P. Shapro,
Attorneys for Appellees and Petitioners.